JOHN MARSHALL HARLAN

AMERICAN BAR ASSOCIATION JOVRNAL

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Improvements in Typography

Despite the wartime difficulties we continue our efforts to improve the appearance and readability of the JOURNAL, *as instanced in the present number. In this we have the diligent cooperation of Poole Bros., our printer.*

Our Cover

George R. Farnum, our historian, this month gives us a lively picture of a southern-born Colossus who emigrated to the North, and who became one of the leading exponents of our Constitution. You will enjoy meeting John Marshall Harlan, the Great Dissenter, who, as Justice Brewer once observed, "Retires at night with one hand on the Constitution and the other on the Bible, safe and happy in a perfect faith in justice and righteousness."

Association Urges World Organization

The most important subject before the 1944 Annual Meeting, aside from helping to win the war, was the Association's attitude and action as to prompt organization of the Nations for peace and law. The forthright resolutions adopted by the House of Delegates placed the Association well in the lead of public opinion on basic principles and main outlines of the plan which is the hope of law-governed mankind.

The American Lawyer's Place and Part in the Postwar World

Because it forcefully brought together the aims and purposes of the organized Bar, in the interests of both the public and the members of the profession of law, the address of Joseph W. Henderson, as President of the American Bar Association, before our brethren of the Canadian Bar Association in Toronto on August 31, is appropriately published in this number.

Eloquent Plea for "A Lasting Peace"

One of the most brilliant comments on two of the many notable addresses at the recent Annual Meeting was that the brilliant discourse by the Honorable Leonard W. Brockington, K. C., the "golden voice of Canada", was "a poem" in prose, so replete it was with vivid word-pictures, historical and literary allusions and quotations, and noble sentiments of the unity of the peoples of the United Nations. On the other hand, the deeply-moving address of the Honorable R. L. Maitland, K. C., of Vancouver, was aptly characterized as "a prayer", reverent and whole-souled, from the heart of a gifted statesman. Mr. Maitland's address is in this issue.

Association Medal for Judge Sumners

A "highlight" of the Annual Dinner was the bestowal of the Association's Medal on Judge Hatton W. Sumners, long the indefatigable Chairman of the Committee on the Judiciary in the national House of Representatives. His services to "the cause of American jurisprudence" have indeed been many and of inestimable worth; some of them have been "conspicuous". Judge Ransom's remarks in presenting the Medal put this signal honor in its proper setting of significance. The recipient modestly conceived the Award, not so much as a personal tribute, as a call to renewed efforts for constitutional government, in which he appealed for help.

George Wharton Pepper's "Swan Song"

The climax of the Annual Dinner was the delightful address by the beloved Philadelphian, who whimsically explained that he regarded this as his "swan song" of appearance at dinners of the Association, and so felt at liberty to indulge in the propensity of swans "to stick out their necks." On a number of subjects he ventured the vigorous expression of mature views, in a characteristic vein which evoked the hearty approbation of his auditors. His closing plea for faith in the future of the American form of government was eloquent indeed. His address is in this issue.

Incoming President David A. Simmons

This issue contains an account of the induction and the "inaugural address" of David A. Simmons, of Houston, Texas, as the new President and chosen leader of the Association. His years of experience in the work of local and state bar organizations, as well as in the upbuilding of the American Bar Association, give him a readiness to grasp and deal with the many tasks which confront the organized Bar in this time of war.

International Law and the World Court

Naturally the problems of international relationships had a large place on the Chicago programs, as well as in the deliberations of the House of Delegates. Judge Manley O. Hudson, of the Permanent Court of International Justice, gave a most informative address on its work, and Judge Orie L. Phillips advanced interesting and constructive suggestions as to the strengthening of international law and its rôle in preserving peace based on justice.

Association Urges that Nations Organize for Peace and Law

The American Bar Association, acting through its representative House of Delegates at its 67th Annual Meeting in Chicago, took emphatic action in favor of "the earliest practicable establishment of a general international security organization" and declared that in its opinion the new organization should be empowered, "with the use of force where necessary, to maintain international order, prevent aggression or acts of war by any nation, and enforce the decisions of the international judiciary."

The resolutions adopted by the House of Delegates, principally on the recommendation of a Special Committee created by a vote of the House on last February 29, not only reiterated the Association's adherence to the basic principles of the Moscow Declaration of the Powers on October 31, 1943, and the Connally and Fulbright Resolutions adopted respectively by the Senate and House of Representatives, but went to advanced ground by advocating specific steps to implement those principles and bring the security organization into being, as well as its use of force to maintain peace and law.

Thus the Association favored the establishment of an "international judiciary" headed by the Permanent Court of International Justice, a "representative Assembly" of the Nations, an Executive Council or World Council, with special emphasis on the place and part of impartial adjudication and a broadened authority of international law as a means of forestalling and preventing the causes of war.

At the same time, the House of Delegates expressed itself as "opposing as unnecessary and unwise the creation of any manner of super-government or super-state." Accordingly, in specific recognition of the applicable principles of international law, its resolutions recommended that the powers of the new organization for security shall be "subject to the limitation that any legislation by it shall not be binding upon a member Nation until such legislation has been referred to such Nation and it has agreed to be bound thereby."

1. ***Resolved,*** that as World War II comes to its decisive phases, the continued consultation, association, agreement and organized cooperation, of the United Nations, will be essential to securing, for this country and for the world, the maintenance of peace and ordered liberty and justice under international law, through the adjudication of disputes by impartial tribunals and the fair adjustment and settlement of such controversies as are not yet justiciable. The American Bar Association notes with the utmost satisfaction the many increasing evidences of the unity of the American people in support of constructive plans to these ends; and the Association notes with particular gratification the evidences that through the pronouncements of the major political parties and their leaders, the carrying forward of these purposes has been removed from the area of partisan differences and political rivalries and conflicts, thereby enabling the public discussion to proceed on the merits of the pending plans.

Principal Functions of Organization Are Declared

2. ***Resolved further,*** that the American Bar Association, while opposing as unnecessary and unwise the creation of any manner of super-government or super-state, reiterates its earnest support of the earliest practicable establishment of a general international security organization, based on the principles declared in these Resolutions. Such general organization for security should include an international judiciary, an Executive Council or World Council, and a representative Assembly, the powers of such international organization to be subject to the limitation that any legislation by it shall not be binding upon a member Nation until such legislation has been referred to such Nation and it has agreed to be bound thereby. In the opinion of the American Bar Association, the obligatory jurisdiction of the international judiciary to decide justiciable controversies in accordance with international law should be defined and limited; the international organization should be empowered to provide for the fair settlement of non-justiciable controversies, through mediation or other peaceful processes; and the international organization should be empowered, with the use of force where necessary, to maintain international order, prevent aggression or acts of war by any Nation, and enforce the decisions of the international judiciary. The American Bar Association does not at this time undertake to recommend or to pass on further details of the desirable international organization, but prefers to put and keep its emphasis upon unity of support for the accomplishment of the objectives stated in these Resolutions. The Committee will be continued and directed, in conjunction with the Section of International and Comparative Law, to study and report to the Association a plan or plans for effectively suppressing acts likely to lead to breaches of the international peace and for the preventing of acts of national aggression, trespass, or violation of international agreements, as well as to execute the orders of any general international organization and to enforce the decisions of the international judiciary.[1]

3. ***Resolved further,*** that it is the considered judgment of the American Bar Association that the essence of the sovereignty of a Nation is its freedom and power to establish justice for its own

1. This last sentence was added by the House after it had been offered by Mr. Stuart Campbell, of Virginia, and agreed to by the Special Committee.

citizens, at home and abroad, promote their general welfare, and provide for peace and security among them; and, in furtherance of those ends, to establish and maintain the means of fair and peaceful relations with all Nations. It is as much an act of sovereignty for a Nation to work out and make agreements with other Nations for the establishment of fair and just relations with them, based on law and fair dealing, as it is to commit an act of aggression or make a declaration of war against them. The agreement of a Nation to submit a justiciable controversy with another Nation for decision and determination by an impartial tribunal according to law is as much an act and exercise of sovereignty as would be its resort to force. The policy of submitting disputes to the jurisdiction of such tribunals for adjudication involves no surrender of the sovereignty of any Nation. It is an exercise of sovereignty for a Nation to join with other Nations in setting up an international organization through which the Nations will work together to establish law-governed justice and fair play and to promote the enduring peace and welfare of mankind.

4. ***Resolved further,*** that in the opinion of the American Bar Association, the extension and firm establishment of the scope and authority of impartial adjudication under law are essential for forestalling and preventing causes of war. The American Bar Association urges that, at the earliest practicable time, as one of the vital steps in an adequate postwar organization of the Nations for peace and law, the Permanent Court of International Justice shall be continued and its jurisdiction and powers broadened, as the highest tribunal in the international judicial organization. The American Bar Association respectfully offers at this time the following for consideration:

(a) That the international judiciary be so organized that it will be reasonably accessible to litigant Nations and Nationals; that hearings be held at such places and times as will not involve too great expense and traveling time to litigants; and that the international judiciary should be an integral part of the general international organization.[2]

(b) That through amendment of the Statute of the Court or other agreement of the Nations, the jurisdiction and powers of the Permanent Court of International Justice should be enlarged and broadened, with defined obligatory jurisdiction; and that the procedure for amending the Statute of the Court to adapt it to expanding needs and changing conditions should be simplified.

Resolved, that the American Bar Association recommends and urges that all state and local bar organizations, other agencies of public opinion, civic groups, and lawyers and other citizens, individually, shall give their careful study and their most active efforts to the subject-matter and objectives of these Resolutions, to the end that there shall be manifest a unified, vigorous and nonpartisan public opinion throughout the country in support of the postwar association, cooperation and adequate organization, of the Nations, for the prevention of war, the maintenance of lasting peace, and the enforcement of justice and fair play according to law, and for the membership and responsible participation of the United States in such a general international organization.

Few Votes In Opposition to the Resolutions

The actions of the House were taken by decisive votes after extended debate, which was on a high level of ability and interest. At first the Resolutions submitted by the Special Committee were opposed by some members of the House who felt that action by the House was premature at this time, and by many members who believed that the Association should go much further in presenting specific and detailed plans for international organization. It may well have been that a majority of the members of the House were inclined to think that the Association ought to be prepared to go beyond the recommendations of the Special Committee; but when it had been pointed out to them, by members of the Special Committee which had long studied the subject in the interest of taking such action as would be most helpful at this time, that the Committee's Resolutions asked endorsement of proposals much more specific than had been endorsed in previous actions of the House and were fully abreast, and in some respects in advance, of the position taken by Secretary Hull in opening the Dumbarton Oaks Conference and by the leaders of both of the major political parties in removing the issue from partisan divisions and rivalries, the recommendations of the Special Committee were generally accepted and supported.

The Resolutions submitted by the Special Committee were voted on separately by the House. Few votes were heard in opposition to any of them, and several of them were substantially unopposed.

Report and Unanimous Recommendations by the Special Committee

The Report and recommendations submitted to the House were the result of six months' work by a Special Committee created by the House at its mid-year meeting, to study and report as to the various proposals for the organization of the Nations for peace and law, including various resolutions submitted to the House at that time by the Section of International and Comparative Law.

The members of the Special Committee were Ex-Judge William L. Ransom, of New York, a former President of the Association, chairman; Judge Frederic M. Miller, a member of the Supreme Court of Iowa, vice chairman; Charles M. Hay, of Missouri, Deputy Director of the War Manpower Commission; Frank E. Holman, of Seattle, Washington; Judge Orie L. Phillips, of Denver, Colorado, Senior Judge of the United States Circuit Court of Appeals for the Tenth Circuit; Ex-Judge M. C. Sloss, of San Francisco, California, a former member of the Supreme Court of California; and Reginald Heber Smith, of Boston, Massachusetts.

The Report and recommendations of the Committee as submitted to the House were stated to be unanimous, except that Mr. Holman stated that, while he concurred in the recommendations, he did not wish "to be regarded as in agreement with all that is said in the Report."

Exchange of Views in Chicago Points Up the Committee's Recommendations

After six of the seven members of

2. In connection with the further implementation of this recommendation by the Special Committee, the further resolutions adopted by the House on the day following, as hereinafter shown, should be examined.

the Special Committee arrived in Chicago and conferred with members of the Board of Governors and of the House, they held a further meeting, at which they prepared a revision of several of their original recommendations, by way of some rearrangement and the clearing up of several questions which had been raised as to the original form, but were not regarded as changing the substance and objectives.

The democratic process by which the recommendations of the Special Committee as formulated when it met on September 2 to complete its report, were perfected, not only to bring them abreast of the developments after that date, but also to take into account the excellent suggestions which many members of the House were able to offer from their discussions in different parts of the country, were completely characteristic of the way in which the House comes to its considered conclusions, through deliberations in conferences as well as through vigorous debates. The recommendations went to the House and were adopted in this improved form which resulted from the conferences in Chicago.

Cooperation of Lawyers and Citizens Urged

The Report of the Special Committee, which it did not ask the House to approve or adopt, contained an extensive analysis of the various pending proposals, as well as a discussion of the troublesome question of "loss" of "sovereignty", both realistically and objectively and from a legal point of view. The Report was thus prepared to be of assistance to state and local bar associations, and to lawyers and citizens generally, in expounding and presenting the important subject of international organization for security, as was earnestly urged by the House.

Pamphlet copies of the Report, with the recommendations in the form adopted by the House, may be obtained by members of the Association, on written request to the Association Headquarters, 1140 North Dearborn Street, Chicago 10, Illinois.

House Goes Further Than Its Committee Recommended

In two respects the House of Delegates acted in pursuance of its disposition to go further than the recommendations of its Special Committee had asked it to go.

The first of these instances came when Stuart Campbell, of Virginia, offered an amendment to Resolution No. 2, to the effect that the Special Committee be continued in existence and instructed to prepare and submit for the action of the House a plan or plans for effectuating the purposes stated in the Resolutions. The Special Committee had not asked for its continuance. This amendment was agreed to by the members of the Special Committee on the floor, and was adopted by the House.

The second instance took place on the day following, when the Section of International and Comparative Law asked the House to adopt Resolutions prepared by the Section's Coordinating Committee for an "international judicial system." The Special Committee created by the House had originally reported against the adoption of this comprehensive plan as first drafted, as being too detailed and extensive for commitment of the Association to it at the present time, before the report of the Judicial Committee of the Dumbarton Oaks conference had been rendered and made public, for consideration along with the Section's proposal.

Conferences between the Special Committee and the Section's Committee had resulted in some clarifications and an agreement on text; and the Section's resolutions were supported by a majority of the members of the Special Committee present on the floor, although the latter had not met to prepare and submit a formal report as to this proposal.

An "International Judicial System" Is Favored

The Section's proposal was debated at length by the House. By some members it was pointed out that it might be premature to commit the Association to so detailed and elaborate a plan. The strongly prevailing view in the House, however, was that the Association should not delay in taking the lead in offering a plan for international judicial organization for consideration as having the Association's approval. It was pointed out that this would not preclude the Association from considering all other proposals when they are brought forward and from stating its opinion as to them and its own present proposal, in the light of the situation then existing.

After the debate, the Resolutions recommended by the Section were adopted by the House with no large number of votes in opposition. They read as follows:

WHEREAS, the effective administration of international justice is an indispensable element in the maintenance of peace; and

WHEREAS, there have not been readily accessible permanent international courts for the adjudication of all justiciable disputes among nations; and

WHEREAS, the history of the development of judicial tribunals in various nations demonstrates the advantage of circuit courts and the service by members of the highest tribunals on circuit courts:

Now therefore be it RESOLVED:

I. That the Permanent Court of International Justice, organized in 1922 at The Hague and known as the World Court, should be continued as the highest tribunal of an accessible system of interrelated permanent international courts with obligatory jurisdictions.

II. That the World Court be so organized that a member shall be available to sit as an International Circuit Court, with original jurisdiction, to hold regular terms in the Capital of each member nation of the International Judicial System. In addition to the World Court Justice on Circuit, each such Circuit Court shall include one or more International Commissioners assigned to sit in an advisory capacity.

III. That an International Judicial Conference composed of jurists should be convened at the earliest practicable moment with a view to concluding an "International Judiciary Agreement" based on the Statute of the World Court, with such amendments as may be necessary to give effect to the foregoing resolutions and to provide for the prompt organization and maintenance of the "International Judicial System."

The American Lawyer's Place and Part in the Postwar World

by Joseph W. Henderson
OF THE PHILADELPHIA BAR

Address of Joseph W. Henderson, president of the American Bar Association, at the annual meeting of the Canadian Bar Association, at the Royal York Hotel, Toronto, Canada, on August 31, 1944.

I thank you for your most kindly greeting, and tell you how deeply I appreciate the cordial welcome and most agreeable hospitality which you all have extended to Mrs. Henderson and to me, throughout our visit to your meeting. I beg to assure you that I do not take this as in any sense personal to ourselves, except as I am for the moment the representative here of your brethren of the Bar south of your border. I shall not try to put into words the sentiments which have been made manifest to us, nor even the response which is in our hearts.

It is a happy privilege for me to be the one to bring to you here at this time the hearty fraternal greetings of the organized Bar of the United States. In behalf of the more than thirty thousand members of the American Bar Association, and the many times greater number of lawyers represented in the House of Delegates from which comes my title and mandate, I say to you that you have our utmost respect and admiration, and that we have long felt for you close ties of kinship in the common tasks of the lawyers of this continent—a kinship and a sense of teamwork which we never felt as deeply as we do at this hour.

Wartime Thoughts Which Lie too Deep for Words

Possibly for your peace of mind, let me say to you frankly that I did not come to Canada to make a speech. Under ordinary circumstances there would be many matters on which I might be tempted to provoke thought and elicit discussion, by submitting some observations of mine for your consideration. But at a time like this when the drum-fire of liberating guns, in the hands of the sons of Canada and the United States, as well as of our gallant Allies, resound in many parts of a stricken world, the thoughts which are uppermost in our minds and hearts lie too deep for public discourse. You would not want me to try to put into words the things which you and we all feel in our hearts in such an hour, and I could not if I would.

Tribute to Canada's Part in the War

At this moment I do want to pay tribute to the Canadian fighting man. He is the equal of any fighter in any Army. Your officers are of the highest caliber, though they probably are younger than the officers of other Armies. They have developed new and successful means of attack. There are no better fliers than yours—perhaps because flying seems to be in their blood. Your Army has been in the heaviest of the fighting, and from Caen to Falais, a distance of twenty miles, they had to fight every inch of the way, but they broke the pivot of the German position in France. In that action, and prior to it, they encountered the bulk of the German armor, because the enemy could not chance a break-through at that point. There is no doubt that their action greatly assisted in the spectacular drives through Brittany and now on to the German border. They did not play a spectacular role, but it was an effective one, and had to be done if other successes were to follow. We of the States salute them, and are deeply grateful for everything that the Armies of Canada, the British Empire, Russia, China, and now France, have done and are now doing. We are happy to be a member of that team—and with the team-play, then the victory is in sight.

Beyond that it must be enough that I am here, as friendly ambassador of the lawyers of the United States, to grasp your hands but leave many things unspoken. We of the States are glad of any opportunity to pay homage, in all sincerity, to you who have borne longer the brunt and the sacrifices of the struggle for a world again governed by law and good-will. It is our proud privilege

to feel that we at least are wholeheartedly at your side.

Our Duty to Men Who Come Back from the War

You may be willing to bear with me if I talk with you for a few moments about other things which are very much in the minds of American lawyers, as to their profession and their country. You will understand that my remarks have no reference to any conditions in Canada, which I do not know. But because I believe that you wish to understand your brethren below the border, I venture to tell you some of the things about which we are thinking.

First, but not because they are the most important in the long run even to ourselves, I refer to matters which directly affect our profession of law. We of the American Bar Association have some 4500 members away in the Armed Forces. Thousands of lawyers not yet members of our Association are also in uniform. They have not been away as long as many of your members have, but we are thinking of the time of their return. We could not leave them to think they are having to wend their way back to place and livelihood and community life alone.

Cynicism and Despair Should not Again Follow the Victory

To my mind, the most poignant novel concerning World War I has always been E. M. Remarque's "All Quiet on the Western Front". The most human, disturbing book concerning the years which followed that War was "The Road Back", written by the same author. Remarque was able to tell an indifferent world how difficult it had been for the young men of his generation, who had left schools and colleges, offices and factories, for the rigors of training and the risks of death in combat, to readjust themselves from the atmosphere of heroism and danger, and to take up again unaided the duller tasks of selling groceries, running routine machines, or doing mere clerical work. The results were disillusionment and cynicism, a bitter disenchantment, which was fertile ground for despair and for revolutionary ferment. Remarque wrote of the German youth, but you and I know that society's indifference and lack of planning in advance left the plight of our own victorious youth often but little better.

The lawyers of the States are, I believe, genuinely stirred that such things shall not come to pass again, in the aftermath of World War II, either as to our returning younger lawyers or as to other men in uniform if we can help to prevent it.

We need to do our full part to aid them to readjust themselves to the many changes. I do not refer merely to changes in judicial decisions, in statute law, and in the administrative agencies, when I say that a great deal has happened, in and to the law and law offices, while our younger men have been away and have been absorbed in the greatest tasks which can claim men's thoughts and energies.

By and large, our law offices, our clients, and our communities, will welcome back most eagerly the young lawyers who have been in uniform. Generally speaking, our active law offices in the States have been and are badly undermanned; and older lawyers have had to return to tasks and to habits of work from which they had thought themselves exempt. Our law school enrollment has dropped some 83 per cent since 1938, and fully one-fourth of those now in law schools are women. For several years, replacements have not come from the law schools in any number or quality sufficient to take over the work of the senior lawyers who have left the profession or have died. Many of our well-established law offices have had, and are still having, a hard struggle to keep up with the volume of work. It may be dangerous to generalize on such a subject; but I anticipate that there will be need, a place, and a hearty welcome, for our young men who come back from the war.

Problems of Placement and Re-location for Lawyers

Many, but not all, of these men will wish to start anew where they left off. Their old places will in most instances be waiting for them if they want to go back. But many law offices and law practices have "folded up" and virtually or totally disappeared, while they were away.

This has not been solely because there was no one left to carry on the work. I referred to the changes which have taken place while they have been away. I do not know how it is with you, but with us there have been vast dislocations and re-locations of business and of law business, during the war. Many new industrial communities, such as depend on and need lawyers, have been completely created during the war. The industrial and business map of the United States has been vastly changed since 1940, and with it the need of communities for lawyers. Some redistribution and re-locations of the profession seems plainly indicated.

The Bar Associations Will Try to Help Cope with the Problems

We rather anticipate, in the States, that more than a few of the younger lawyers, when they doff their uniforms, will be minded to try a fresh start in the practice of their professions, in a new State, or at least in a new locality, where the need and the opportunity for them may be better or different. I hope and believe that lawyers of the United States who have not been able to serve their country in uniform will be receptive and helpful, toward any such disposition of our returning lawyers to seek new placement and opportunities.

I feel that we could not afford to be selfish or unduly restrictive, or place unreasonable impediments in the way of such a search for opportunity, on the part of men who have given much and risked all, in their country's cause. The bar associations of the United States are preparing to cope with these problems of placement.

Challenging Legal Problems Confront All Our People

But I would not have any of you form an impression that we of the organized Bar of the United States are concerning ourselves chiefly with what may be termed "the bread and butter", the means of livelihood, of the members of our profession. I am sure that you will all know that this is not so. On the contrary, we, as lawyers and as citizens, are beset with challenging legal problems which, in our country, vitally affect the well-being and the future happiness and security of all our people, including the lawyers.

The Prime Minister of Canada, the Honorable Mackenzie King, has been quoted as saying, to the citizens of Ottawa upon his return from the Imperial Conference last May, that—

> The Postwar era will not be an easy period in which to live.

I do not undertake to appraise that era as to your country, but I could echo and adopt the statement in many respects, as to my own. In the States, I can foresee dangers that life in the postwar period will not be altogether easy.

Lawyers Can Help Make the Postwar World Less Difficult

We of the organized Bar of the United States believe that there is much which we, as lawyers and as citizens, can help to do to make the postwar period a more pleasant and less irksome period in which we all can live. We as lawyers can help bring back to the American scene the wholesome climate and atmosphere of liberty and opportunity.

To that end, we as lawyers are mightily concerned that in our country the relaxing of the wartime controls, the reconversion of our vast sprawling machine of war production, the disposition of our war plants and great stocks of raw and finished materials, and the reduction of the oppressive incidence of taxes, shall all be handled in such a manner as to restore the free and full operation of free enterprise, the dauntless spirit of our business concerns, the opportunities of all our people for livelihood and advancement, and reasonable standards of living.

Failure to do promptly and sufficiently these things which mean a "green light" for the dauntless American spirit of enterprise, achievement and individual opportunity, could do more damage to the future of our country and our profession than all the bombs of our enemies have done to England.

In seeking to give the largest measure of leadership we can to a stricken world, and in helping to guide and shape from our experience these urgent things in the interests of all our people, we think that we shall best serve also our own prosperity and well-being as lawyers, because the practice of our profession depends in large measure upon the vigor and vitality of free competitive enterprise in American communities.

Administrative Abuses Need to be Promptly Curbed

We lawyers in the States are gravely concerned also with the growth of bureaucracy and administrative absolutism in the guise of wartime controls and the ousting of our courts and lawyers from jurisdiction and authority to protect the rights of persons and property against discretion based on radical theories and against arbitrary powers exercised by officials who recognize no responsibility to our Congress, our courts, or our electorate. The American Bar Association is hard at work in behalf of legislation to curb and prevent such abuses.

Our dangers and our problems, as to expanded, over-elaborate and irresponsible administrative controls, were so very well put by your Governor of the Bank of Canada, Mr. Graham Towers, in his convocation address at McGill University last May, that I venture to read it to you as a clearer statement than I could phrase:

> The danger is that such controls are of so technical a nature that those officially exercising them are liable to come gradually into a virtually autonomous position, where they are without criticism or check from the public or the public's representatives. The only way to prevent such a condition from arising is to extend public education in the issues of social and economic policy. Eternal vigilance is necessary, but it must be an informed vigilance.

Lawyers Should Lead in Efforts for International Security and Law

Perhaps above all, we lawyers of the United States are mightily determined to aid and advance in every way we can the early establishment of an adequate organization representative of the sovereign peace-loving nations, for the purpose of substituting orderly adjudication by law-governed courts for the discretion and aggressions of the chiefs of States, for giving reality to international law broadened so as to assure the ascendancy of justice and fair play, and for maintaining the security of all law-abiding nations and peace of the world, such enduring organizations of the peace to be backed by the enlightened opinion of mankind and also, when needed, by the force "available promptly, in adequate measure, and with certainty", as our beloved Secretary Hull put it on August 21.

From the beginnings of enlightened conscience about human happiness and security, the jurists, the lawyers, in all lands, have been leaders in efforts to lessen wars or limit the effects of wars. At first, the efforts of the jurists were to separate the civilians from the armed forces and to spare the civilian populations, as far as could be, from the ravages and horrors of war, which was "total war" in the Dark Ages, as it has become again in these times. Through an international law which had little more authority or status than a consensus of international conscience, the lawyers and jurists tried to draw distinctions between military and civil objectives, and to give to the latter some measure of

protection, through devices which modern warfare has made ineffectual and even largely impracticable.

Orderly Adjudication as a Substitute for Aggression

In more recent times, the efforts of lawyers and jurists have turned largely to the substitution of the processes of reason, fair play and orderly adjudication, for the methods of aggression and armed warfare on defenseless peoples. Great leaders of the Bar in all of the Americas have gained added lustre for themselves and their profession by their untiring efforts in behalf of international arbitration or adjudication, as the best means of settling international disputes, between nations and between individuals and nations, which might be provocative of war if not determined by impartial tribunals which command and hold the respect and confidence of enlightened mankind.

In this respect, I am happy, for the lawyers of America, to acknowledge here our vast debt to many distinguished men of your Bar, who have rendered enduring service, at Geneva, The Hague and elsewhere, to the World Court and the great cause of international adjudication and arbitration for the settlement of provocative disputes. It may be invidious to single out names from such a galaxy, for mention here; but I venture to refer to such outstanding lawyers as the Honorable Charles J. Doherty, Senator Raoul Dandurand, and Sir George Foster, and also the Honorable Newton W. Rowell, of Toronto, who came so often to meetings of our Bar Associations. These men are no longer on earth to lead and guide the present struggle for an adequate international organization of courts for establishing the rule of law, justice and peace; but I entertain no doubt that they have, and will continue to have, worthy successors from your Bar, in this the greatest of all human endeavors.

It is a great satisfaction for me to be able to say to you tonight that the American people, irrespective of political party, faiths, their localities, or their origins, are united and militant as never before, in behalf of bringing about such an international organization as was favored in the Moscow Declaration of the principal Powers and was so happily advanced at the Dumbarton Oaks Conference in the United States during the week of August 21.

On July 31, I stood as the representative of the American Bar Association in the beautiful Palacio de Belles Artes, in historic Mexico City, and brought to the delegates constituting the Inter-American Bar Association the same urgent message that I bring to you tonight, as to the need that the lawyers of this hemisphere shall give active and militant support to the practicable plans to organize the world for peace, justice and law. Although that new Association has not yet attained the maturity and seasoning which characterize your convocations, you would have been heartened by the response which was evoked by my plea that lawyers take the lead in ensuring a better world order, not in blue prints or elaborated plans, but deep in the minds and hearts of men of mutual good will.

The Cycle of Time Has Brought a Brighter Hour

One of your great journals[1] recently brought back to mind the fact that in the critical hour, many tragic months ago, the New York *Times* said, in an editorial:

> It is twelve o'clock in London. HITLER has spoken and Lord HALIFAX has replied. . . . Twelve o'clock for the common people of England, out of whom England's greatest souls have always come, twelve o'clock for all that they are and have been, for all those things that make life worth living for free men. Twelve o'clock and the wisest prophet in Christendom cannot say what is to come. . .

Well, since those stirring words were written, great events and heroic sacrifices have come to pass, and the cycle of time has run its course. It is nearly twelve o'clock again, but not for the people and the ways of life then deemed to be in such jeopardy. The history, the traditions, the rights and customs, the beauty and the gentleness, of England and of France, are not menaced by tyrants at this turn of the clock, but seem certain to live on, in a new dignity and strength, born of a realization that these things, which our enemies never had, could not be conquered or even be crushed.

"Nearly Twelve O'clock" for Our Utmost Efforts as Lawyers

With all our hearts, we believe that it is now nearly twelve o'clock again, but that the bells will this time toll the end of tyranny, the end of outrages against the peace of the world, the end of the torturing and debasement of the souls and minds of men.

My friends in Canada, I assure you that we of your profession in the United States, we who cherish the same traditions of law and justice as you so deeply hold, are steadfast in our most earnest hope that in this last quarter of an hour before midnight for Axis brutality and aggression, the lawyers of our two sovereign peace-loving countries may be able to do a great deal to help make the postwar world a better and more pleasant place in which to live, by helping to make it a world in which individual rights, opportunties and freedoms are again respected and protected against arbitrary power in public or in private hands, and in which the reign of peace, justice and fair play has been established as the supreme law of the nations. It is nearly twelve o'clock for our utmost efforts to bring these things to pass.

It may well be that in some material respects the postwar world will not be altogether a pleasant time and place in which to live, but I believe that it will be a most interesting and worthwhile time in which to live—an era in which we lawyers will be able to make great contributions to human happiness and well-being, if we have the will and the faith to do all we can to help bring our communities and our countries back to sound, firm footing.

1. *The Ottawa Journal*, August 14, 1944.

DAVID A. SIMMONS

President, American Bar Association, 1944-1945

President Simmons Sounds Keynote

At the closing session of the Assembly in Chicago on September 14, David A. Simmons, of Texas, took office as President of the Association for the ensuing year, and indicated his point of view and objectives, as to the work of the Association under his leadership. He likened the historic gavel of the Association as a symbol of "a torch which passes from hand to hand," always forward, and is to be carried "straight into the future."

In presenting his successor, Retiring President Joseph W. Henderson said: "David Simmons—to all of us, your devoted friends, just Dave—I now turn over to you this historic gavel. I am sure that the names of the men which appear upon the bands, representing all phases and types of lawyers, men devoted to the welfare of the profession, will give you profound inspiration. Again thanking all present for doing what you have done during this present administration, I now say that it is with the greatest pleasure that I present to you a great leader under whom this Association will go forward."

Incoming President Is Warmly Greeted

The large assemblage rose and applauded enthusiastically in token of their readiness to carry forward the work of the Association under its new leader.

"In accepting this gavel," declared President Simmons, "I am fully aware of its history and of the distinction of the men who have wielded it. It seems to me that when it is handed to any man by Joe Henderson, we get it directly from the founders. This gavel, beautifully embellished in silver and gold, and with the names of the most distinguished lawyers of America upon it, was first an humble carpenter's mallet purchased at Saratoga Springs, New York, in 1878, by Francis Rawle, who during his lifetime and later years was the distinguished senior member of the firm of Rawle & Henderson, which is now headed by our distinguished friend. And so I realize that this gavel comes to me directly from the founders. But if it were not a gavel, and if it were a badge of distinction of ancient days, it would still not be the laurel wreath that was used to crown the victor, because that is not the emblem of leadership with us.

"The American Bar Association's presidency is not awarded, in these later days at least, as an emblem of distinction in this nation. If it were, I am sensible of the fact that it would never have come to me. The emblem that seems most likely to be in mind is the torch which passed from hand to hand, and everyone took his turn in carrying on from here to there. The work of the American Bar and of the lawyer in our Republic is not a race run upon an oval track in circles; it goes from here straight into the future. With that conception of the dignity and importance of this office and of the meaning of this symbol, I accept it.

His Concept of the Work of the Association

"This Association is entitled to know not only that I am grateful and appreciative and understand the significance, but to know also of my conception of the work to be done and that which is immediately before us. The objects of our Association were beautifully put by the man who wrote them in our new Constitution. Six objects are stated: To advance the science of jurisprudence; to improve the administration of justice; to seek uniformity of legislation and judicial decision throughout the nation; to uphold the honor of the legal profession; to encourage cordial intercourse among the members of the Bar, and, last, to correlate the activities of the bar associations in all the states.

"To which of these shall we give particular emphasis at this time, and what brief specification shall we now state? Obviously, unanimously, the war work. I told General Cramer today as he left, in your name and by your authority, that this year, as last year and the year before, we would continue as his civilian assistants. Next, the work of rehabilitation of the returning veterans to assist them and their dependents as you have ordered by resolution, and among them, not least but dearest to us, the lawyers who have gone away and who have returned.

Forty Thousand Lawyers Now in the Armed Forces

"Did you hear the figures that General Cramer gave this morning as to the armed services of the United States? Forty thousand lawyers—let that sink in just a moment. In this nation, according to the last census, there were 179,545 lawyers. Forty thousand is one out of every five or less. I think we have done our part. You count the number of people in the nation and the number of lawyers in the service in proportion to our numbers. It remains for us at home, of course, to do our equal share.

"A specific object must be to carry forward that important work started by President Henderson—the

Administrative Law bill in Congress. We must see to it that it is passed. It ought to be passed. I am sure it will be passed.

"The last specification in that list of objects of the Association was to correlate the activities of the state bar associations. To what end? That the lawyers of this country might speak as a unit both for themselves and for the public of America."

Report of Results of Informal Questionnaire

The incoming President then referred to the questionnaire which he had sent informally, about a month before, to the members of the House of Delegates. More than 160 members of the House checked it and responded to it. "One of the questions which we have discussed for many years," he said, "is: Shall we take a broad view of national leadership? Shall we speak on matters of importance where our special skills and knowledge make it wise that we speak?

"Some of you said yes; some of you said no. Those of you who said 'Yes,' in favor of a broad interpretation of our powers and obligations, numbered 134; and those who said we should take a limited view numbered 27.

Organized Bar Must Accept Public Leadership

"To me that is the most interesting statistic I have seen about the American Bar Association in many years. It indicates that whatever we may have thought before, we now realize that the lawyer of America must accept public leadership, and that this House of Delegates and this American Bar Association must speak for the lawyers of America.

"To do that effectively and efficiently, and really to represent the lawyers, we have to tie in, as this House ties in, with the lawyers in the several states.

"Coming up through the ranks of the local and state bar associations perhaps I feel a little more keenly the necessity of tying in with the men back home. At any rate, I expect to give some emphasis to that sixth point in the objects of our Association, to correlate the activities of the bar associations in the several states.

Steps for Closer Tie-in with State Bar Organizations

"Specifically, within the last two weeks I have written to the presidents of the bar associations in the forty-nine jurisdictions. I have asked them for suggestions; I have asked them for help. I have asked them something more definite: 'What committees do you have in your state that match any committees of the American Bar Association?' And: 'If you have committees like our committees, please send me the names of men who are chairmen of those committees, who are actively engaged in the work of the profession in your state.'

"Thirty-one have answered. Perhaps other answers will be on my desk when I return home. The message which I get from the presidents of those thirty-one bar associations is to the effect—like your vote I mentioned a moment ago—that 'we want to follow the leadership of the American Bar Association, and we will be delighted to have our men represented on committees of the American Bar Association. We want you to take the lead, and we will work in the states.'

Proposal as to the Size of Association Committees

"And so, gentlemen, I come to a practical proposition. The President of this Association is authorized to appoint committees. We have fourteen Sections and thirty-eight Committees. The President has nothing to do with the Sections and all of their related committees. He does appoint the members of the thirty-eight committees—some of them with restrictions as to the membership on the committees, some without restrictions. The committees vary in size. They average five or seven members each. That means that the President of this Association can appoint about two hundred lawyers in the United States on our working committees.

"We have over thirty-two thousand dues-paying members and we can affiliate our work with that of the states through only some two hundred appointments.

Advisory Committees Should Be Restored

"Some years ago, for a year or two we had some Advisory Committees, and we still have one or two Advisory Committees. In thinking out this problem and the questions posed to me by the state associations, I think it important to re-create some of those Associate and Advisory Committees, in order that we may tie in with the work of those associations.

"The President is authorized to appoint them in about six or seven instances, specifically by name, in the By-laws, and then the By-laws say, 'and any other committees'—'and on any other committees where the House of Delegates consents.' Obviously I cannot tie in work of this Association with the chairmen of the state committees in forty-eight states, and have only five committee members on a definite committee. Some of the states have these committees; many of them do not. I would say that in the average instance there will be twenty-five states which will match our committees. I want to tie those active men in, either in a place on active committees or on Advisory Committees.

A Few Committees Should Be Enlarged

"In addition to that, in two or three instances it would be well, I think, to enlarge the committees by not to exceed a couple of new members. This is a very detailed routine matter; but I believe you understand the importance of it, if you will think what it means to tie in with the activities of the state bar associations, all of them, in work as we have tied in with war work, what it will mean to this Association, what it will mean to the membership of this Association, what it will mean for the influence of this Association. So I would

like to have, if you will grant it, the authority—'your consent' is the way it reads in the By-laws—your consent to create traditional Associate and Advisory Committees for any of the Standing or Special Committees where I find on investigation that state bar associations have a substantial number of similar committees: and, as part of that, I should like authority to increase, by not to exceed two members on any committee, a few of the committees, in no instance this authority to make any committee larger than nine members.

"It is a small, mechanical detail in which I am required to have your consent and if someone will be so gracious as to make that motion, I would appreciate it."

Mr. W. E. Stanley, of Kansas, accordingly moved "that the request of the President with respect to the action which he has suggested with the committees, with the advisory groups, be granted."

The motion was put to a vote by President Henderson, and was declared to have been adopted.

Mr. Tappan Gregory Is Inducted as Chairman of the House

Before the induction of President Simmons, Mr. Tappan Gregory, of Illinois, was presented to the Assembly as the new Chairman of the House of Delegates. "Mr. Gregory, the House is most fortunate that you have been selected to preside over it for the next two years," declared President Henderson. "Your work is known. You have carried on one of the greatest pieces of work that organized lawyers will ever undertake in their history. I refer to your magnificent stewardship of the war work of this Association. Not only that: You are thoroughly familiar with all of its workings, and you know what it requires and what it needs. You will supply both of those wants.

"I can only warn you that you are following in the footsteps of most distinguished predecessors, beginning at the time the House started and going right through the years to the man who has just walked off this platform. I know that this Assembly, speaking through me, wishes you a most successful administration in presiding over the destinies of the House during your term of office. We welcome you, Mr. Gregory."

The incoming Chairman expressed thanks to those present in the Assembly "for the honor you have conferred upon me. I am profoundly grateful. I accept this high office mindful of the attendant exacting duties connected with it, painfully conscious of my own shortcomings.

"I know you do not expect me to equal the matchless record of my brilliant predecessors, but be assured I shall serve you to the best of my ability in interpreting the wishes of the House and seeking to help make effective its decrees." (Applause)

Major General Myron C. Cramer, The Judge Advocate General of the Army, Joseph W. Henderson, President of the American Bar Association, and Rear Admiral Thomas L. Gatch, The Judge Advocate General of the Navy.

Not for Today Alone

by R. L. Maitland, K. C.
OF THE CANADIAN BAR

Address before the American Bar Association at its Sixty-seventh Annual Meeting, Drake Hotel, Chicago, September 11, 1944.

I can't tell you how much we feel as if we were coming back home to be here again at a meeting of the American Bar Association. The warmth which is atmospheric in the American Bar has once again sent its rays piercing through the hearts of Mrs. Maitland and myself.

The last time we met you was in San Francisco town, that city of friendly people on the smiling shores of the Pacific, and at that time the President was the late Frank Hogan, that great man who had, as was said this morning, a genius for making friends, and a great legal mind. Frank Hogan has been gathered unto his fathers, but those things—he left—with the American people.

Today you have in the Chair Joseph Henderson – hard to call him Joseph after you have known him for a few days. We had him up in Canada for a week and I thought I was President of the Canadian Bar Association, but when he had been there a couple of days, I didn't know who was. He became so popular that when we made him a life member of the Canadian Bar Association, the boys suggested that he come back soon and run as President. Well, we would be glad to see him back. We only make one stipulation and that is that he has got to bring Ann with him.

Times have changed, haven't they, since 1939, since those pleasant, kindly summer days on San Francisco Bay? Oh, I remember that well now; that was before the war. Those were sort of easy days. Now when we look back some things were the same. I think you had an election coming on. All the Republicans had to worry about was the New Deal, and all the Democrats had to worry about was the Republicans.

Now I have heard that you have another election. I don't know much about it, but I have heard that this Presidential election will go down in history as sort of the "battle of the ages."

Don't think that I am taking any part in your campaign, but some fellow told me that every candidate over sixty was having his face lifted so he would look younger, and every candidate under forty was growing whiskers so he would look older.

You know, there is only one solution. You had better nominate a redheaded man like Joe Henderson, because they look younger than they are, and they act older than they look.

Of course, your system is a little different than ours. Your Constitution fixes the date of your election. The dates of our elections are fixed by the Government—sometimes it turns out that way, too.

Then I went back again to San Francisco Bay in 1942 and there I saw men and women, war workers marching, marching in defense of liberty. I stood on the shores and I looked out to the sea and I saw a convoy going out from San Francisco, a destroyer, two or three or four freighters, and maybe another destroyer and then some more freighters and then a battleship, some of those poor old freighters that hadn't been in society row for years—they had their lipstick on. They were painted up a bit and with those sister ships that looked sort of down their nose at them in days gone by—they marched out to the Pacific like Tugboat Annie, to help fight that battle for freedom.

Now we are in war, not the same kind of war as we knew in days gone by. I heard Mr. McCracken say something this morning about how close we are together in this old world now. War in days gone by was something where men went out in the field and fought with each other and some country sent a fleet out in the sea and they had a battle and then you decided who had won.

Last year we sent the editor of a paper in a city in British Columbia called Kelowna, a Mr. R. P. Mac Lean, of the Kelowna *Courier*, and we sent him over to London town to see what war looked like, and he came back on the eve of a Victory Loan campaign and when he came back, he wrote this in that paper:

"I have seen men climb into bombers in the early midnight hours and fly away, waving nonchalantly, and I have seen the gap in the mess when they did not come back. I have seen their comrades covertly watching the debriefing blackboard for the first word of their safe return, and I have seen their comrades turn silently and quickly away as the blackboard was wiped clean, obliterating the last trace of those men on that station.

"I have seen the hospitals with the mauled men, the legless and the blind, the fingerless hands and the burned faces—all the destruction

that steel and fire can do to a man's body and mind.

"I have seen women and children standing on the streets of London after an air raid, watching their homes burn or dully contemplating the havoc that a high explosive bomb had wrought. I have seen men lying on the streets of London, their lives suddenly ended with the falling of a bomb from the clear, moonlit sky."

That is modern war, and I cannot picture what the next war will be with this robot that has just started. So tonight I am going to talk about peace. I am going to talk about freedom.

You see, we are a people who believe in freedom. You could not hear that magnificent address of your President this morning—and that is going to be an epic in the library of the American Bar Association in years to come—without knowing as I know that we believe in freedom of choice, freedom of opportunity, that freedom that made this continent great and gave you everything you have, that freedom that made our Empire great; that freedom the love of which inspired the victory that is coming in this war.

We lawyers must be on guard to maintain it and we must be ever on our guard to defend it. And when that peace comes—and I think it is coming pretty soon, now—we must turn our minds to peace and we must remember that peace is not an academic thing; it must be real and it must be practical. If it is to be lasting it must have behind it something more than pious hopes, something more than that words alone can make the world behave.

Peace-loving nations have agreed now that machinery and organization and physical power must be available to maintain peace in the future, and that this is just as necessary as a night watchman or a policeman, in the town which at times seems peaceful and where all seems to be well.

You know, people thought about that after the last war and the war before that, and every major war we have ever had, and now they are asking as they have never, never asked before: Are the warnings of the past to be once again disregarded and forgotten?

You know, experience is a great teacher, and the greatest of wisdom comes from experience. We lawyers must march with that vast body of men and women who seek once and for all the formula for a lasting peace. It is not enough for us at our annual meetings to proclaim this defense of civil rights and defense of liberty, and our opposition to undue interference with personal rights. We have got to look beyond that, got to look beyond our library; we have got to look beyond our courthouse, because we are supposed to be leaders among the people.

The lawyer who understands freedom and all that freedom means must feel a natural impulse to cry out for world freedom. He must understand what Sir Wilfred Green understood when he proclaimed the right of all nations, small and great, to live their lives and adopt their institutions in freedom without the need of fear or ill treatment from any other nation.

Men and women, that is really what this war is about. That is the reason why the United Nations today are reenacting the story of the Good Samaritan.

Throughout Canada—and we have had five years of it now—and throughout your own country, too, there are homes where the circle has been broken, where there is an empty chair and a feeling perhaps that hope has been abandoned. In those homes there are a thousand "ifs" to conjure with.

I wish I had the power tonight to say something that would really help those people who have lost their boys in this war, but you know reflection is a great thing, and in thinking about it I have come to the conclusion that reflection tells me that out of this tragic loss there is hope and there is comfort.

Always remember this, that life at the best is an uncertainty. You see, it is not the years that one puts into his life that counts; it is the life that he puts into his years. There is a long life span and then there is a short life span, and some may accomplish in a very short time great things indeed, and sometimes they accomplish more than those who live out the fullness of their years.

I want to say this today that if those boys who die in this war die for a victory out of which will come a lasting peace, their death will have contributed to something as glorious as anything that history has ever recorded. That would be the answer. That would be the reward, because in that short span of life they will have done so much even for generations yet unborn, and it can be that way. It can be that way if we have a lasting peace.

I am one of those who believe that we can look forward to lasting peace with a hope such as the world never had before. Why do I say it? First, another war has been added to history, and the old story of suffering and loss and destruction has been told again. Once again civilized and understanding people have learned that you cannot overcome a danger by running away from it. In these days when the world is so close together there can be no such thing as physical isolation in this world. There always has been the desire on the part of right-thinking men for peace, but heretofore the wish has been stronger than the will.

For three hundred years every major-war peace treaty has purported to aim at a lasting peace, and then trusting nations have trusted, and while they trusted pacifists became vocal giants and statesmen became magnificently indifferent. Woodrow Wilson and others had a vision after the last war. That was a great vision: that was a dream, the dream of the League of Nations. If that had come true, maybe we would not have had this war.

There may be opinions as to the best method. I am not discussing that tonight, but I know that no method will succeed unless the people believe in it, and unless the people work for it. If they do that and they

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Medal for "Conspicuous Service" Given Congressman Sumners

HONORABLE HATTON W. SUMNERS

The American Bar Association's 1944 Medal for "conspicuous service to the cause of American jurisprudence" has been awarded to the Honorable Hatton W. Sumners of Dallas, Texas, the Chairman of the Committee on the Judiciary in the National House of Representatives. The presentation of the Medal took place at the Association's Annual Dinner, in Chicago, on September 13, where the members of the large audience attested with prolonged applause their appreciation of the appropriateness of the Award and their admiration and affection for the jurist whose public services in the legislative branch of government long have been outstanding.

At the opening of the dinner, President Joseph W. Henderson introduced Ex-Judge William L. Ransom, of New York, a former President, "to perform a very pleasant task in behalf of the Association."

Distinguished Recipients of the Association's Medal

"Mine is a most agreeable privilege", said Judge Ransom, "to speak for a few moments in behalf of the Association and all of you.

"The award of the American Bar Association Medal was established in 1928. By the terms of the resolution, the Medal is to be given each year—

> 'to a member of the Bar in the United States who shall have rendered conspicuous service to the cause of American jurisprudence.'

"The roster of that award is truly of the great, in our profession and our country:

Samuel Williston
Elihu Root
Oliver Wendell Holmes, Jr.
George W. Wickersham
John H. Wigmore
Herbert Harley
Edgar B. Tolman
Roscoe Pound
George Wharton Pepper
Charles Evans Hughes
John J. Parker

"These men have been great jurists, teachers of the law, statesmen in our internal affairs and in the international sphere, practising lawyers of the first rank, tireless workers in the many tasks of the organized Bar, leaders in improving the administration of justice under law—great public servants all, ornaments of our profession. We are happy that four of them are here in this room.

Award for the First Time to a Lawyer-Legislator

"Tonight we are proud to add to this roster of honor for the first time the name of a lawyer whose conspicuous service to American jurisprudence has been in the legislative branch of our Government—in the halls of the Congress. I am happy to make known to you all that the Association's Medal for 1944 is being bestowed on Judge Hatton W. Sumners, of Texas (prolonged applause).

"This may be significant of a marked trend of our times—that the great issues of constitutional government are not now chiefly in the courts but are in the Congress and in the forum of public opinion. If there is any reason why I have been chosen as spokesman for this award, I suppose it is because of the many times I have been privileged, during many years, to work with you, Judge Sumners, as to measures and matters in which this Association was interested, in behalf of the public and our profession. That has been a most agreeable experience. Sometimes you thought we were right, and sometimes you thought we were wrong, and sometimes you said that what we sought could not be done. But always you gave us a fair hearing and a considered, friendly judgment. No representative of this Association ever received less from you, on any mission.

Judge Sumners' Services Are Cited

"If I were to put this award in the conventional form of citation for an academic honor," declared Judge Ransom, "I would present you, Judge Sumners, by saying:

HATTON W. SUMNERS: Member of the National Congress for more than thirty-one years; Chairman of the great Committee on the Judiciary during more than twelve years; a devoted public servant; a lawyer learned in the art of law-making and wise in the ways of making legislation come to pass; a staunch defender of the Constitution of his country and of government within and according to the Constitution; constant champion of independent and competent and impartial judges and courts; equally the implacable foe of corruption or misconduct in judicial office; advocate always of improvements in the administration of justice; stalwart friend of the rights of states, of local self-government, of free men and free enterprise; courageous leader in all efforts to preserve constitutional government and resist the inroads of arbitrary power in the hands of governmental or private groups.

"On this Medal, from its founding, has been cast the words:

> 'To the end that it shall be a government of laws and not of men.'

Such a Medal goes as of right to you, Judge Sumners, because you have labored hard and long to keep this truly 'a government of laws and not of men.'

Admiration and Affection for Judge Sumners Are Attested

"But we do not merely recognize tonight your conspicuous services to the cause nearest our hearts", said Judge Ransom, "nor are we content to tell you only of our admiration for your work and for you. This award is token also of our deep affection for you. Hatton, we love you as a friend; we are happiest when you are in our meetings as you are in our hearts. To you I apply the words of welcome always, which Thomas Osborne Davis put in the mouth of one of the legendary kings:

> 'Come in the evening, or come in the morning;
> Come when you're looked for, or come without warning;
> Whenever you come, there's no other before you;
> The more often you come, the more we'll adore you.'"

Judge Sumners Responds with Deep Feeling

The Association's spokesman then summoned Judge Sumners to the center of the dais, and gave him the Association's Medal for 1944, amid the applause of the whole assemblage, which had risen to its feet. Judge Sumners was deeply touched by the award and the demonstration in his honor, and responded briefly but earnestly as follows:

"There is no way in which I could properly express my gratitude for the great compliment which this great body has bestowed, but I am thankful because this testimonial of your confidence helps me in doing my humble job in accomplishing the greatest thing which at this moment challenges the lawyers of this country and the people of this country, and that is, the preservation in America of free government. There is nothing more that can be said than that.

"Each of us has his own little job to do. When we look at the picture of the world tonight, when we see the sacrifice that our men are making on the battlefields of the world, we should realize the fact that in America we are challenged to attempt to do that which we know is a difficult thing, have for them when they return a government worthy of their sacrifice. There is not a man or a woman in this audience tonight who can be certain that he can leave or she can leave to his or her children the heritage of living under a free government.

The Greatest of Challenges to Our Lawyers Today

"It is a wonderful thing, it is a fascinating thing to me, to see the Bar of America meeting this challenge, the challenge of the ages, in the greatest tests that have come in the history of Anglo-Saxon governments. When as a people we have wandered away, say what you please, it has been the lawyers who have aroused the people and led us back to the discharge of neglected duty. In so far as I know the history of Anglo-Saxon government, no such challenge in the history of Anglo-Saxon governments has come to the

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The International Law of the Future

by Honorable Manley O. Hudson
JUDGE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

Address before the American Bar Association at its Sixty-seventh Annual Meeting, Drake Hotel, Chicago, September 11, 1944.

I have been told that I have chosen a somewhat forbidding title for this occasion, and lest you find it so I shall introduce what I have to say by asking you not to be frightened by its imposing reverberation. I realize that international law is a remote subject to some people. To many laymen it seems to present itself as a ghost which stalks only in distant parts of the earth, without any relation to the work-a-day world in which they live and toil. Even to some lawyers it looms as an esoteric if not an evanescent mystery, to be invoked only when it serves to bolster a prior political conviction. Yet with fifty millions of the young men and women of our generation actively engaged in fratricidal conflict, with a hundred millions of human beings now the homeless and destitute victims of agonizing tragedy, with stores of the earth's treasure being dedicated to destruction, I make no apology for asking you to reflect upon the International Law of the Future as a problem of the here and now and as one which enters into the warp and woof of our every-day living in the twentieth-century world.

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Our country is now faced with a problem more difficult, more complicated than any with which we have had to deal since 1787.

Two world wars within a single generation have brought to us a staggering challenge. Despite our relative seclusion in the nineteenth century, we were drawn into a phase of the Napoleonic Wars. In the twentieth century, our remoteness from wars in other continents has disappeared. Two oceans have ceased to serve as the bastions of our coasts, and even the plains have become exposed to the possibility of invasion. Our great national power does not assure us of adequate protection, and we find ourselves compelled to engage anew in a search for national security. If it was a gross exaggeration for us to be told two decades ago that another world war would bring the end of civilization, it is no distortion for us to say today that the prospect of recurring world wars at intervals of twenty-five years is one which none of us would willingly bequeath to succeeding generations. Escape from that prospect has become the great preoccupation of our time.

To find that escape, we are called upon to chart a course for the future. With other peoples of the world, we shall have to choose between policies which would imprison mankind in the insecurity of militarism and policies which would mobilize human intelligence and ingenuity in an effort to keep men free and to safeguard their constructive endeavor.

Our problem is not merely a matter of determining what a tired and impoverished world will plan for the next ten years. We must have in mind the clouds which may gather in a second decade to come, and the forces which may be shaping themselves twenty years from now.

We can be more confident of the efficacy of what we may try to do if we appreciate the limitations within which we shall strive. We do not start with a blank slate. The world was not made yesterday. Whether we like it or not, history imposes its limitations, and we can build only with a knowledge of what it teaches. If we shall not all agree on what its lessons are, I think we may agree that ignorance of the history must not be served up to us in these times as a sign of progressive thinking.

And if the world was not made yesterday, neither will it stand still tomorrow. It is not for us to ordain what the future shall be. No generation can bind its successors in a straight-jacket. The wisdom of the time is likely to be deemed a safer guide than the wisdom of a time that has gone before, and each generation will insist, as ours insists, on meeting its own difficulties in its own way. Indeed, it may be prone to go further and to flaunt its own superiority by belittling the efforts of its immediate predecessor. How else can one explain the attitude now current in many quarters toward some of the constructive steps which were taken twenty-five years ago?

As lawyers, we can appreciate these limitations with no disposition to conclude that all effort is unavailing. Without holding out false hopes, without creating expectations which cannot be fulfilled, we can seek to leave no stone unturned which might help to pave the road which will lead the world out of its present morass. Realizing that we cannot

bind our children and our grandchildren in the solutions which they will seek for the world's problems twenty-five to fifty years hence, we can hope that with wisdom and with courage we may succeed in shaping agencies and methods and procedures which can be handed on to serve their time as well as our own.

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The United Nations have set themselves the task of "laying the bases of a just and enduring world peace securing *order under law* to all nations." Our principal spokesmen have called for the "reestablishment of *law and order*" in a distressed and a distracted world. These are goals to which our legal profession can devote itself wholeheartedly, and they are not likely to be attained, along sound lines at any rate, without our aid.

In its continuous development over a period of more than three hundred years, our system of international law has shown a remarkable toughness and vitality. It was not destroyed by the Thirty Years' War in the seventeenth century, it lived out the strain of the Napoleonic Wars, it came through the World War of 1914. We may be confident that it will survive this war.

Yet despite its toughness, despite the enormous progress which it has made during the past fifty years, our system of international law has remained lamentably weak. It has not brought security, and it has not kept the peace. If escape is to be found from recurring world wars, we cannot content ourselves with the reestablishment of international law as it has existed in the past. We shall need what Secretary Hull has described as "the revitalizing and strengthening of international law."

Seventy-three nations existed in the pre-war world. We must assume that most of them will continue to exist in the post-war world. Each of them is proud of its own culture, each is guardful of its own traditions, each desires to pursue its own way of life. Yet all of them exist in a shrinking world, all are struggling with the advances of modern technology, all are caught in the maelstrom of twentieth-century civilization. No people is able, indeed none is willing to live completely aloof from other peoples.

These nations, or States, do not form and they do not wish to form a single world State. Yet none of them can secede from the one world in which we live. As that world is shaping they must act together in many fields, and their continuous common action calls for permanent international organization. This began to be appreciated almost a hundred years ago, when a proposal was made by an American Postmaster-General which led, after more than twenty years of discussion, to the successful league of nations which we now call the Universal Postal Union. In the intervening years, numerous other permanent international organizations have been formed, and immediately before the present war the United States was participating in several scores of organizations, not for any altruistic reason but for the protection of American interests which could not be effectively advanced in any other way. Yet the world came down to the fateful year of 1939 without any general organization adequate to protect the prime interest in security which all peoples have in common. It is chiefly for this reason that international law has remained so feeble.

Inevitably, therefore, our quest for a viable legal order in the world of States leads us into this central problem of organizing the Community of States within which the International Law of the Future is to find its application. The necessity of organization now stands out with striking clarity to our own as well as to many other peoples, and the success of effort directed to this end has become the touchstone of permanent gain from our winning the war.

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I think we may congratulate ourselves that so much progress has been made in this matter during the past twelve months. In September a year ago, a fruitful initiative was taken by the Republican Council which met at Mackinac Island. In October, our Secretary of State made definite proposals in line with that initiative to the Conference at Moscow, and they led to the recognition by the four principal States of the necessity for "a general international organization . . . for the maintenance of international peace and security." In November, the terms of the Moscow Declaration were repeated in a resolution which was adopted by our Senate without any partisan division and by an almost unanimous vote. Since that time the leaders of both the Democratic and the Republican parties have kept the problem before the country as one of a national interest which transcends any sectional and any partisan division. Foregoing any desire for credit, showing a disposition to consult with people of various minds and to receive suggestions from any quarter, aided by the willing cooperation of leaders of the opposing party, Judge Cordell Hull has laid a basis for national unity which few of us would have thought to be possible one year ago. It is an achievement in statecraft which bids fair to rank with any in the annals of our national history.

Today the problem is in the hands of the international conferences at Dumbarton Oaks. Those conferences have been preceded by many months of preparation in the Department of State. Men of many minds have taken part in that preparation, and the results of it are now being presented to other Governments by a representative American delegation. As the conferences themselves are confined to but preliminary exchanges of views, there is every guarantee that before the stage of commitment is reached our public will have ample opportunity to ponder, to appraise, and if necessary to criticize what may emerge from them.

The very object of such a preliminary exchange of views is to avoid commitments which would be premature from the point of view of our own or of other peoples. Some time may therefore have to elapse before

announcement can be made of the results. For my part—and I suspect that many of you will share my feeling—I am not disposed to anticipate that event. With the information already supplied to us concerning the tenor of the negotiations, I think most of us will await the complete announcement with a strong inclination to find the tentative proposals as satisfactory as any which might meet with general acceptance.

Meanwhile, it seems essential that we should seek to preserve the unity which offers such happy augury for effective American participation in a general international organization. That unity can be dissipated, and we should not ignore the possibility. Scepticism obtains even in high quarters, and to some extent its influence may not be unwholesome. The difficulties will probably arise not so much from avowed opposition as from apprehensions of fanciful dangers. Let me refer to two such apprehensions which are currently voiced.

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First of all there is a vague issue concerning sovereignty. On the one hand, a relatively small number of people clamor for the surrender of national sovereignty to an international authority. On the other hand, a somewhat larger number of people seem to be hesitant to support even modest proposals for international organization for fear of a loss of national sovereignty. I submit that for our present purposes both of these approaches are beside the point.

Words can do strange tricks with thinking, and *sovereignty* is one of those words which Humpty Dumpty might have explained to Alice as meaning "just what I choose it to mean."

In some quarters—and they are to be found on both sides of the fence—it seems to be assumed that to be sovereign a State must be free to do what it pleases, when it pleases, and in any part of the world which it may select. In that sense of the term, neither the United States nor any other State existing in the world today has ever been sovereign, either as a matter of fact or as a matter of law.

As a matter of fact, though States have sometimes succeeded in imposing their will on less powerful States, they are bound to have regard for the interests and desires of other peoples. In the modern world, few States are immune from the necessity of considering the actions of others even in the formulation of some of their so-called "domestic" policies, and to our sorrow we have learned that a people which desires to continue its peaceful pursuits may be drawn into world wars originating in quarrels in which it has taken no part.

As a matter of law, the sovereignty of each State is subject to the international law which regulates the relations of States *inter se*. That has long been a basic postulate of our international law, and throughout our national history—especially so in the present war—the policy of the Government of the United States has been directed to its vindication as such. Without such a postulate, the whole foundation of an international legal order would crumble.

In a less objectionable sense of the term, *sovereignty* may be employed to refer to that freedom of action which a State enjoys within the limitations of international law. What those limitations are depends at any given time upon the content of international law. As that content is not static, a State's participation in shaping it may be described as its exercise of a prerogative of sovereignty.

Perhaps I may appropriately refer to a significant utterance of the Permanent Court of International Justice which in several cases has been confronted with contentions based on conceptions of State sovereignty. When it was asked to say that a State had diminished its sovereignty by a particular treaty, the Court replied that it declined "to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty." Though the treaty might place "a restriction upon the exercise of the sovereign rights of a State, in the sense that it requires them to be exercised in a certain way," the Court was disposed to view the power to make the treaty as "an attribute of State sovereignty."

At any given moment, many thousands of treaties are in force among the seventy or more States of the world, and the precedents are numerous by which States—including the United States—have conferred on tribunals compulsory jurisdiction to deal with their disputes, and have otherwise restricted their freedom to resort to a use of force. Nor are precedents lacking of States' obligating themselves to effect certain dispositions of their national economy; in recent years the United States, for example, has ratified various Inter-American and other treaties which have had that result. Apart from any question as to the practical desirability of such action, the assumption of such international obligations by a State must legally be deemed to be an exercise and not an abridgement of its sovereign powers.

I am therefore disposed to say that so long as it retains control of its domestic affairs and of the conduct of its relations with other States, a State's exercise of the treaty-making power to promote cooperation with or to assume obligations to other States can entail no loss of sovereignty.

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Difficulties may also arise to imperil our unity on the general objective in consequence of constitutional problems which will be raised with reference to any plan of organization which may emerge from our consultations with other Governments. Questions concerning the extent of the treaty-making power, concerning the role of the different branches of our Government in its exercise, concerning the effect of the specific attribution to Congress of the power to declare war—all of these are questions which lie within the special competence of the members of this Association, and I am confident that we shall approach them without subordinating either the national interest or the means by which it can be protected.

I suggest that none of these questions presents a serious obstacle to our adoption of a course which will serve our national interest. To conclude that the treaty-making power is thus limited would mean the undoing of the great constructive work of John Marshall during his thirty-four years as the Chief Justice of the United States. It would fly in the face of the fact that no provision in any of the hundreds of treaties which we have concluded during one hundred and fifty years has ever been authoritatively pronounced to be beyond the constitutional power of our federal Government. Historically, we have developed three methods of exercising the treaty-making power—by agreements consented to by the Senate, by agreements authorized by the Congress, and by executive agreements—and a choice between these methods is usually to be governed by political considerations rather than by constitutional limitations. Over our history, also, neither constitutional nor international regulations concerning the declaration of war have prevented the use of our armed forces abroad for the protection of our interests. As it has guided our national life, the Constitution has served us not as a restricting vice but as a great enabling instrument, and I think many of us share the view of one of its ablest interpreters[1] that "the appropriate agencies of the national Government are free to decide on grounds of national interest, substantially unfettered by constitutional limitations of any kind," the question of our role in an organized Community of States.

If our present national unity can be preserved, if it does not fall prey to divisions between parties, I think we can entertain high hopes that substantial progress in international organization can be made in our time. After our experience of twenty-five years ago, perhaps we may usefully remind ourselves that no one nation may be able to get all it wants in international negotiations, even if its people are unanimous in the desire. It is too much to expect that every group in every country will be completely satisfied with every detail of any plan of organization which may be adopted. Of necessity, the agreement of many nations will require that account be taken of approaches which the peoples of various countries can make only from their differing angles.

The general judgment which Americans will be called upon to take will have to be based upon a discriminating scale of values, and high in that scale must weigh the overpowering necessity of agreement upon some plan to be launched in our time and to be handed on to a succeeding generation. The course of recent history would seem to have made it clear, and I believe we may lay it down, that there will be no general international organization in the near future unless the people of the United States are willing to take part in it in a measure commensurate with our power and prestige. Once we have taken a decision to that effect a host of issues which we have debated during this quarter of a century will cease to plague us and will vanish overnight. We shall not arrive at any perfect solution, but we may console ourselves that what we do will not rest immutable through all the ages and that men as inspired as we, as possessed of wisdom and of virtue, will succeed us on the stage of world affairs.

If the establishment of a general international organization is an essential condition of the revitalization of international law, it is merely a beginning of the effort which we may direct to that end. It will lay a solid foundation for what we may undertake to do, but the organization itself will need a basis more enduring than shifting political combinations between a few powerful States—that basis must be derived from a universal legal order. Hence no plan of organization will exhaust the possibilities of the present opportunity of our profession.

Perhaps it is not too much for us to hope that such a constructive step will be accompanied by an authoritative declaration of principles to guide our endeavors and to chart the course along which international law may be developed during the second half of this century. Such declarations have frequently been made in times gone by. If the travail of our time has produced a will to push out along new lines, great political leaders now have an opportunity to give fresh impetus to effort to establish a more effective legal order. Yet it is unlikely that they will move very far in this direction unless our profession can give them both guidance and support.

What then are the lines along which we should wish to see developed the International Law of the Future? I suggest that they have been blocked out by our experience during the past twenty-five years. Three objectives have been before us during this period, and with respect to each of them some progress has been achieved: (1) the proscription of the use of force for the service of national ambitions; (2) the improvement of pacific means for the settlement of international disputes; and (3) the extension of existing law by a process of international legislation. If I may refer briefly to what has been achieved in each of these fields, I shall permit myself to offer some suggestions as to what we may now have it in mind to accomplish.

1. For centuries, international law did not grapple with the use of force in inter-State relations. An outbreak of war was viewed merely as a fact which produced a shift from a law of peace to a law of war. Some jurists sought to distinguish in general terms between just and unjust wars, but the distinction imposed little restraint on governments. If for reasons satisfactory to itself a State declared war against another State, or if it resorted to a use of force without a declaration of war, the action was deemed to concern only the States involved. It was neither legal nor illegal. It was extra-legal. Other States were classified as neutrals, but

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1. Edward S. Corwin, *The Constitution and World Organization*. (1944), p. 30.

AMERICAN BAR ASSOCIATION

Journal

The Sixty-Seventh Annual Meeting

The 1944 Annual Meeting of the American Bar Association will be recorded and remembered as one of the most inspiriting and worthwhile in its long history. Although both the attendance and the pattern of its proceedings were limited by the wartime conditions as to travel and hotel facilities, as well as by the absorption of lawyers in other tasks, the militant spirit and quality of the meeting made it memorable; and the actions taken will constitute a considerable contribution to an informed public opinion upon many vital matters.

This issue of the Journal is devoted chiefly to chronicling some of the principal events at the meeting and to presenting a few of its many notable addresses. Within the short time after the adjournment, it was not physically practicable to obtain the transcript of the proceedings of the Assembly and the House of Delegates and to put together our usual narrative of the debates and the actions voted, in those bodies. These summaries are necessarily held for our November issue.

The outstanding action taken by this meeting was in advocacy and support of an international security organization to enforce peace and establish the ascendancy of law. The forthright Resolutions adopted by the House of Delegates, after earnest debate, are published in full in this issue, and should be read by every lawyer.

This meeting was distinguished by the presence and participation of Canadian lawyers and jurists who brought most friendly messages from our brethren of the Bar across the border. The gifted address by the Honorable R. L. Maitland, K. C., of Vancouver, B. C., lately the President of the Canadian Bar Association, on "A Lasting Peace," was one of the most moving utterances in the annals of the American Bar Association. The message came deeply and reverently from the heart of a gallant leader who had himself sustained a tragic loss in the war. It is published in full in this issue.

Also from Canada came again its eloquent voice, the Honorable Leonard W. Brockington, K. C., who gave at the Annual Dinner a most vivid and stirring address, based on his own experiences on the Normandy Coast on D-Day, and in many remote parts of the earth, where the sons of England, Canada, and the United States are making the supreme sacrifice for liberty and law. Mr. Brockington left Chicago to return to European battlefields. Regrettably, as he spoke without full notes, his classic address, which all will wish to have and read, cannot be published until he has received and returned the stenographic transcript.

This meeting was fortunate in the presence also of the beloved George Wharton Pepper, of Philadelphia, who spoke in his usual felicitous vein at the dinner, and of the eminent Judge Manley O. Hudson, American member of the Permanent Court of International Justice. Their addresses are in this issue.

In many respects the sessions in Chicago were the culmination of the year of sustained work, by the Association's Sections and many Committees, under the leadership of Joseph W. Henderson, of Pennsylvania, as President. The chief objectives of the year's work had been brought together by him, in a timely address before the Canadian Bar Association on "The American Lawyers' Place and Part in the Post-War World." This is appropriately published in the present issue. His vigorous Annual Address on "Making Secure the Blessings of Liberty" is reserved for publication in full in our November issue.

The 67th Annual Meeting was the stage for many notable addresses. Unfortunately the JOURNAL's wartime number of pages is too limited for the publication of all the notable addresses which merit it.

The responsibilities of leadership for the Association year passes to the experienced hands of David A. Simmons, of Texas, long a tireless worker in many projects of the organized Bar. The statement of his point of view and objectives as to the work of the Association was heartily received by those in Chicago, who quickly manifested their readiness to continue their diligent work in behalf of the Association in wartime.

Especially did this 1944 meeting make clear at all times, from its impressive opening moments to the final fall of the gavel, that the American Bar Association will carry forward with undiminished zeal the many things it has been and is doing in aid of the prosecution of the war to complete victory, and meanwhile will be vigilant and militant in helping to meet the difficult problems of the peace, on the home front and for the returning members of our profession, as well as in doing all it can to fulfill the hopes for a world of peace and justice based on law.

The Association Takes Advanced Ground

With few votes in dissent after a notable debate, the House of Delegates on September 11 and 12 moved to an advanced position, in its advocacy of the organization of the Nations for security and in making specific its recommendations for an international judiciary to substitute adjudication for aggression as the means of settling justiciable disputes between Nations. Through the forthright action of the House of Delegates, the Association declared its views as to both the basic principles and the main outlines of the desirable international organization. The Resolutions adopted by the House, upon this the most vital issue before the recent Annual Meeting, are published elsewhere in this issue.

The House of Delegates voted no "blank check" or advance approval for an international security organization in whatever form the pending proposals may eventually take. On the contrary, the House stated very specifically the elements which it believed to be essential to an acceptable plan at this time, and reserved for its later consideration some controversial and possibly divisive aspects on which the whole perspective has not yet been made clear. The Association chose "to put and keep its emphasis on unity of support for the accomplishment of the objective stated in these Resolutions."

Manifest both in the Resolutions adopted and in the debate was the pre-disposition of experienced American laywers to keep well in mind the demarcations between judicial, legislative and executive or administrative action, by the proposed international organization. Wholehearted emphasis was placed on adjudication and the creation of an international judiciary adequate to cope with controversies which might be provocative. As to any legislative acts, by the "representative Assembly" or otherwise, the House was explicit in declaring that the powers of the international organization "shall be subject to the limitation that any legislation by it shall not be binding upon a member Nation until such legislation has been referred to such Nation and it has agreed to be bound thereby." Although this principle of referendum as to legislation may be deemed to be implicit in international law, the Associaton was careful to implement by this specific declaration its opposition to "the creation of any manner of super-government or super-state."

On the other hand, as to the scope of administrative action to prevent acts of aggression and maintain peace, the House was explicit in its advocacy of adequate powers for the international organization, including the power, "with the use of force wherever necessary, to maintain order, prevent aggression or acts of war by any Nation, and enforce the decisons of the international judiciary."

Many members of the House, perhaps a majority, plainly wished the September action of the Association to go much beyond the considered recommendations of the representative Special Committee which had been following the subject closely since last February. Some of those who favored still more definitive action were at first impatient with the suggestion that although American public opinion has moved a long way toward unity meanwhile, it has not yet crystallized on all details of the desirable structure, which still constitute puzzling problems for the men of good will in conference at Dumbarton Oaks. These members of the House urged that the Association should "lead" and present now a complete "blueprint" of what the United States and its Allies should try to build and do.

On the final votes, however, the large majority in the House accepted the view that the recommended Resolutions went about as far as was advisable at this time, and that the House would have full opportunity to speak and act later, at its mid-winter meeting, on further details which at present might be divisive and disruptive of the non-partisan unity. The House voted to adopt an amendment offered by Mr. Campbell, of Virginia, from the floor, to continue the Special Committee and to instruct it to study and report to the House "plans for effectively suppressing acts likely to lead to breaches of the international peace and for the preventing of acts of national aggression, trespass, or violations of international agreements, as well as to execute the orders of any general international organization and to enforce the decisions of the international judiciary." In addition to this forthright action for definiteness in plans—an amendment accepted but not initiated by the Special Committee—the House adopted also the resolutions of its Section of International Law, recommending a detailed form of organization for the international judiciary. The animating spirit of the House was that expressed by Elihu Root during darker days of World War I: "The representatives of the American Bar should speak regarding their attitude toward this conflict with no uncertain sound—should speak as men who have all their lives been standing for justice and maintaining law and liberty."

In the background of the deliberations of the House was keen realization that the organization of the Nations for security and law presents two issues, which have to be faced and overcome concurrently. The first is the question as to whether or not there shall be created any such structure at all. The second has to do with the ways and means of making it adequate and effective. The efforts to arouse and unify American public opinion in behalf of the early establishment of an organization for international security against the recurrence of wars may fail unless that public opinion is also alert, open-minded, militant, and united, in behalf of the development of practicable plans which will be backed with the will of the Nations and the enlightened support of their peoples. Early division on details might well be fatal. Reasonable solutions may be found, by men of good will, for problems which

might create schisms if pressed prematurely.

This may be illustrated: The central problem at Dumbarton Oaks has been that of giving to the World Council of the new organization the power and authority to act and to act in time, with the use of force where necessary, and at the same time to preserve for the United States and other Nations their controls over their own armed forces and their constitutional processes of decision. The availability of armed forces sufficient to prevent acts of aggression will not keep the peace, unless there is the united will to act and the power to act promptly. There were sufficient forces *in existence* to repel aggression when Italy ravaged Abyssinia, when Japan invaded Manchuria, when Hitler marched to the Rhine and later into Czechoslovakia; but neither governments nor public opinion were ready and insistent that armed force should back the diplomatic protests against wanton aggrandizement. The Nations were divided in their councils; and public opinion shrank from taking the steps which, if promptly initiated and supported, might have prevented the global conflict later.

The mechanics of open-minded draftsmanship may find solutions, so far as structure is concerned. At Dumbarton Oaks, it was at first proposed that force could be used only by a mandate adopted by a unanimous vote of the principal Powers in the World Council, as well as a majority vote of the whole Council. This might have tended to satisfy those who wish to avoid advance commitments by the United States, as the American delegate could be governed by instructions requiring, for example, the assent of the Congress for the use of American forces outside this hemisphere; but it all posed a problem of effectiveness if the threatening aggressor were one of the principal Powers. Then China and other Nations suggested that no Power should be permitted to destroy unanimity by voting in the Council on any issues involving its own aggressions. This was evidently unacceptable to some Nations; but while the House of Delegates was in session, a compromise was brought forward that, in such an event, the Council itself should decide whether the Nation whose acts were in question should be permitted a vote on the issues. It seems unlikely that even this suggestion will prove to be the final formula of adjustment; but it illustrates the progress which can be made by men who strive for acceptable solutions, and it points also the dangers which would be inherent in trying to commit American public opinion to particular machinery or formulae too soon, in obscuration and eclipse of the paramount objectives.

This whole subject, in all its ramifications, is one for the most enlightened and constructive statesmanship. Its tasks should be undertaken in the spirit so admirably expressed by George Wharton Pepper, in his address as published elsewhere in this issue. State and local Bar Associations, and lawyers in their home communities, should follow the leadership and recommendations of the House of Delegates, in explaining the issues to the people and aiding the development of an informed and vigorous public opinion. This is the duty and the opportunity of American lawyers, for free institutions and government "by large bodies of law" rather than "small bodies of men" are not likely to last long in any country if arbitrary power and unbridled aggression are permitted to sway and rule the world.

The Medal for Judge Sumners

A heart-warming event of the recent meeting was the bestowal of the American Bar Association Medal for "conspicuous services to the cause of American jurisprudence", upon Congressman Hatton W. Sumners, the indefatigable Chairman of the Committee on the Judiciary in the National House of Representatives. As was significantly pointed out, this was the first time that the Association's cherished Medal has been awarded to a lawyer-jurist in honor of services rendered chiefly in the legislative branch of government.

Too often the patient, skilful workmanship of a patriotic lawyer in a committee room or conference of the Congress, which makes an invaluable contribution to American law and constitutional government, commands no conspicuous public acclaim or attention. For many years, Judge Sumners has been a zealous author and advocate of legislation to improve the administration of justice and eliminate its abuses, as well as a valiant defender of the American constitutional system.

Members of the Association have long been aware of Judge Sumners' great services to American courts and jurisprudence. They have admired and loved him for his rugged devotion to the public interest, which has transcended partisan divisions and differences. They were happy when he received the signal honor which he had so justly earned and which he so warmly appreciated.

Judge Sumners made it clear that he sees difficult tasks not far ahead, which will call for the united efforts of citizens who believe in constitutional government. He will go on, doing all he can to maintain responsible government; but he is aware that he needs fresh recruits, valiant and numerous reinforcements, if the struggle is to be won. He was heartened by the compliment paid him by the American Bar Association, but he appealed most of all for the active help of its members, in their home communities.

A Substitute for War

Those who spoke before this year's sessions of the Assembly, the House of Delegates, the Sections and at

our Annual Dinner, gave public demonstration that men of our profession are coming to much closer accord in regard to the participation of the United States with other peace-loving nations in the conviction that the world can no longer permit war to be the method for settling disputes between nations, and that a better instrumentality must be provided for that purpose. Through all those addresses there ran an expression of strong conviction that even though the task seemed difficult we should redouble our efforts to prevent wars of aggression and substitute justice for force in the settlement of disputes between nations.

In a notable address before an "Open Forum to discuss International Organization for Peace and Justice under Law," the full text of which appears in this issue, the Honorable Orie L. Phillips, United States Circuit Judge, outlined the plan which followed the analogies of the method by which private disputes have been decided by peaceful means, and the resort to violence has been forbidden and prevented.

There is sound philosophy and good common sense in the study of analogies drawn from experience and history.

Judge Phillips says that "we can no more prevent controversies from arising between nations than we can between individuals," and that the only hope for preventing wars in consequence of disputes between nations is to "provide impartial tribunals which will entertain their complaints and afford protection for their rights and redress for their wrongs."

That is the very method by which disputes between individuals have come to be decided by our courts and not by resort to personal conflict.

History demonstrates that man is a fighting animal. Primitive man fought his way up to supremacy in the animal kingdom, but after centuries of conflict men came to realize that man's most dangerous foe was his brother man.

Man, however, was endowed with other faculties and attributes which saved him from destruction. He was given a mind which enabled him to understand and remember, to draw lessons from his injuries and invent remedies for their cure and prevention. The greatest of man's inventions was the creation of tribunals which should settle controversies between man and man according to the justice of the case.

That invention proved to be a more satisfactory means for the settlement of disputes between individuals than their settlement by personal conflict and because men found it better it was developed and improved, until today man does not resort to force for the settlement of his controversies except for those few quarrels for which we have not yet provided a method of judicial decision.

May we not profit by the study of this analogy?

Constitutional Method of Ratifying Treaties

At the September meeting of the House of Delegates, Mr. James R. Morford, of Delaware, offered for its consideration a Resolution by which he asked the Association to endorse and approve an amendment of Article II, Section 2, Paragraph 2, of the Constitution of the United States, as to the powers of the President and the Senate, so as to provide for the ratification of treaties by a majority vote of both Houses of the Congress, instead of by a two-thirds vote of the Senate, as at present.

The Committee on Draft (The Resolutions Committee of the House of Delegates) reported the Resolution favorably, on the last day of the meeting. It was discussed at some length by its sponsor, as will appear from the report of the House proceedings in our November issue. In view of its importance and the lack of time for full debate, the Resolution was made a special order of business for the mid-winter meeting of the House.

Meanwhile, the proposal should be thoroughly considered by members of the Association, who will do well to make known their considered views to their delegates and other members of the House. The subject merits the fullest public discussion, and the JOURNAL will not express an opinion as to its merits, in advance of the debate and action in the House.

In favor of the submission of such a constitutional amendment to the states by the Congress there is urged the desirability of having the ratification of treaties represent the action of both branches of the Congress, in order fully to express the popular will; also, the desirability of removing the possibility of the defeat or delaying of important treaties by less than a majority of the members of the Senate.

In opposition to such an amendment there is urged both the general undesirability of submitting constitutional amendments for action at a time when so many voters are absent from their home states because of service in the Armed Forces, and also what is said to be the undesirability of proposing changes in the method of ratifying treaties, at a time when highly important treaties are soon to come before the Congress, on subjects which affect the future of peace and law in the whole world. It is urged that the merits of the proposed amendment should not be entangled with the public discussion of the objectives of the particular treaties.

As to the latter consideration, doubts have been expressed whether such an amendment of the Constitution could be submitted to the states, and acted on by a sufficient number of them, in time to change the manner of ratifying the vital treaties which are now in formative stages. In any event, the Resolution submits an issue on which the considered judgment of American lawyers should be developed and expressed, through the action of their House of Delegates early in 1945.

The Need for Faith in the American System

by George Wharton Pepper
OF THE PHILADELPHIA BAR

A delightful and stimulating address delivered by the concluding speaker at the Annual Dinner of the American Bar Association in Chicago on September 13, 1944.

It is a signal honor to address such an audience as this. It would be an honor under any circumstances, but particularly is it so tonight, when the Medal of the Association has been presented to so worthy a recipient as my dear old friend, Hatton Sumners, and when the speaker of the evening has been that other good friend, Leonard Brockington. And, not recognizing myself in terms of the compliments that have been paid me, I merely say that to find myself upon the same program with them gives me faith to believe that there is room for asteroids even among stars of the first magnitude.

* * *[1]

And as for Leonard Brockington, we all remember that matchless speech of his that he made in Philadelphia four years ago. He has since risen to as great heights of oratory, but never greater. But tonight he seems to me to have surpassed himself, and he has appreciably strengthened the already strong ties that bind his country and ours together. [Applause]

It seems to me, Mr. President, that Brockington and Birkett, as messengers of good will, are doing a matchless service at a moment when it is of immense importance that such things should be done; for no matter what may be the like-mindedness of the two great English-speaking nations, it will be inevitably true that points of difference will arise, and there are always those who take something like a morbid satisfaction in exaggerating them. Brockington, like Ariel in "The Tempest," is the sort of spirit that calms incipient storms, and as he flies hither and yon, he leaves behind him a wake of good will. [Applause] He cannot say, like that other whimsical spirit, Puck: "I'll put a girdle round about the earth in forty minutes"; but he can go Puck one better, for he has put as many girdles around the earth as there are parallels of latitude, and every one of them a hoop of steel!

I believe that your splendid tribute to him, given a few moments ago, will constitute for him a commission to carry your affectionate greetings to Norman Birkett, to bid him Godspeed in the work in which he and Brockington stand shoulder to shoulder, and greetings to our staunch and splendid English allies. [Applause] And to you, Leonard Brockington, may I say, as Prospero said to Ariel in "The Tempest," "Be free, and fare thee well!" [Applause]

Brockington, incidentally, is one of the few justifications for after-dinner speaking. [Laughter] It is a curious fact that lawyers in general —I shall not say judges in general, but lawyers in general and particularly judges—love to talk and hate to listen; and we who earnestly desire their esteem know perfectly well that we can usually best gain it by keeping our mouths shut. And yet, we welcome every opportunity to harangue them, and while it may be true that it is love that makes the world go round, I suspect that, save in exceptional cases like Brockington's, it is vanity that inspires the after-dinner speaker.

Mr. President, when you invited me to speak, I know that you were primarily moved by loyalty to the Philadelphia Bar, that Bar which you adorn and which was so signally honored when you were called from its ranks to occupy the presidential chair. But in calling upon me, you took a long chance. It is a dangerous thing, Mr. President, to tender the floor even to a Senator who is still in office, when all know what a Senator can do to the floor when he gets it, and how inadequate the Senate rules are to curb forensic oratory. But it is even more hazardous to tender the floor to an ex-Senator, when, for years, there have seethed inside of me great thoughts on all public questions, national and international, thoughts worthy of acceptance by a grateful public,

1. The remarks of Mr. Pepper at this point as to Judge Sumners in approbation of the bestowal of the American Bar Association medal on him, are quoted in connection with the Award, on page 574 of this issue.

thoughts worthy of winning the applause of a listening Senate—if the Senate ever listens [laughter]. How did you know, Mr. President, that I would not drench this innocent audience with a flood from the stored-up oratory of years? And if I do something like that tonight, I am sure you will manfully take the blame; because the fact is that when I was privileged to speak at the dinner in Philadelphia four years ago, I honestly thought that I was singing my swan song. But you have ordained it otherwise. You have flushed the old bird again. [Laughter and applause]

It may be that in some minds there lingers tonight that ancient epigram:

"They say swans sing
before they die—
"T'were no bad thing
"Did certain persons die
before the sing."

[Laughter] But, after all, the most notable feature about a swan is not his song but his neck, and when he sticks out his neck, that's something! And if I unduly extend mine tonight, Mr. President, you will please attribute it to the senility which inevitably overtakes both Senators and swans. [Laughter]

Let me give, as example "A" of sticking out one's neck, such a statement as this: That here and now I venture to express dissent from one or two of the points made, Mr. President, in your own excellent recent article on "International Justice Under Law." And when I also challenge Manley Hudson, you will know that my fears respecting my senility may not be ill founded.

I am wholeheartedly for the perpetuation of the Permanent Court of International Justice, but I think it would be a grave mistake if, in continental fashion, it were ever to become the organ of the political or policy-making body which may be set up to take the place of the League of Nations. And I think it would be an equally grievous mistake—and I believe my view prevails quite generally in this Association that it would be a mistake—to continue the advisory opinion function, as one that is potentially destructive of the judicial character and independence of the court.

I know some "house counsel"—such, for instance, as my dear friend, Mr. Greenlaw of the Chicago Bar—who can retain their independence of thought and action though they be "house counsel" for some great corporation; but in most cases, I have observed that "house counsel" so identify themselves in interest with the client that when they render advisory opinions, they are merely rationalizing the conclusion which the client desires them to reach; and I think it would be a sorry day if it were to come about that the Permanent Court of International Justice should ever become the "house counsel" for a policy-making or political organization, set up as part of our scheme of world reorganization.

I may say in passing that as a student for many years of international affairs—I may, perhaps, without intellectual arrogance, suggest—that I am sometimes surprised at the amateurishness of the utterances of those who speak and write about international affairs, and the sort of persons who alone are supposed to be competent to understand them. What we shall need at the council table is not confident cocksureness nor mere familiarity with diplomatic precedents; what we shall need are men skilled in smoking out the other fellow, in probing his mind, not so friendly with him as to be predisposed to accept his proposals, and not slavishly committed to the details of a preconceived plan.

I hope that the next President of the United States, whoever he may be, will send to the council table such men as I have described. Such men should be those ready to commit the United States to any well-conceived and hopeful plan of post-war reorganization and world reconstruction, but firmly determined never to permit Uncle Sam to delegate to any nation or any group of nations the power to determine whether or not he shall be involved in war, in circumstances not yet foreseen, and in contingencies not yet foreseeable. [Applause]

I believe that the question where you vest the authority to summon a nation into war is one of the fundamental questions in international relations. It is the sort of a decision which in the nature of things a nation must make for itself. It is the sort of a decision which a nation cannot delegate to anybody else, no matter how trusted.

It was the point upon which the League of Nations controversy turned a quarter of a century ago; and if President Wilson had accepted a reservation covering the point, the United States, for good or for ill, would have become a member of the League of Nations. And I have the faith to believe that while we propose in this country to cooperate to the utmost in a scheme of postwar reorganization such as was outlined to you today, for example, by a great jurist, a man of faith, Orie Phillips, we shall always retain in our own hands the ultimate decision as to whether on a future occasion we shall or shall not be summoned into war.

Young gentlemen—and I speak particularly to the young men present—mark my words: The uncovenanted free will of the people of the United States is the greatest peace asset in the world tonight. [Applause]

I turn to an entirely different subject, merely remarking in passing that no self-respecting swan would bypass an opportunity to speak of *stare decisis*. [Laughter] This is a subject that you can treat either with levity or seriousness. With levity, let me say that I notice that our good First Lady, during one of her absences from home, has evidently been affected by this judicial tendency to upset our established doctrine of *stare decisis* and has applied it even in the case of a sacrosanct administrative tribunal. For the press, I observe, records her as emerging from the cool caverns of thought and branding as ridiculous a directive of OPA which forbids the sale of two pairs of pants with one coat.

I will say, however, that she was conservative enough to call them trousers. [Laughter]

Still in lighter vein, may I comment upon one phase of this subject not often referred to, and that is, the ruthlessness with which well-known litigants are nowadays retired to private life. Take as a single illustration, Swift and Tyson. Swift and Tyson for years were national figures. Very few lawyers in this assembly know what those men did to gain the distinction, but everybody knows that Mr. Justice Story dragged them from obscurity and turned upon them the judicial spotlight, and for years they were national figures, until suddenly they and some others of the aristocracy of litigants were driven from their proud positions by a barrage from the Supreme Court.

There were Paul and Virginia—to take names around which there was always the pleasant suggestion of romance. Paul and Virginia occupied a great place in our affections, but suddenly, and almost without warning, they were swept aside, and the United States and the Southeastern Underwriters were set up as a sort of a puppet regime in their place. [Laughter] This was unwelcome even to the Southeastern Underwriters. [Laughter] I am credibly informed that they would have preferred to remain in more or less honorable obscurity and to leave the spotlight to Paul and Virginia.

Now, things like this make old chaps like me nervous. We have spent, ladies, years of our lives and pounds of our effort in establishing social relations with people whose positions we thought were secure, and now in our old age we are called upon to make friends with a whole generation of upstart decisions which, with the heartlessness of youth, seem to care very little whether or not we make friends with them.

We can jest as we will about this subject, but we cannot ignore its serious aspect. The simple truth is that the judicial doctrine of *stare decisis* is the only basis for the scientific development of the law. [Applause] The test of a science is possibility of prediction. The only possible way to predict what a court will decide is by a study of its past decisions, the deduction of general principles from those decisions, and the applicaton of those principles to new states of fact.

Law is a social science, and in every social science there is plenty of leeway for the exceptional case; and it is always possible to reverse in whole or in part an old decision and furnish a new starting point for future development.

The fact is that much of our law and most of our constitutional law consists in rationalizing distinctions which are differences of degree. Whether the citizen is triable by the ordinary courts or by a court-martial or by an administrative tribunal, whether a particular measure squares with our idea of due process of law, whether a certain extension of federal authority threatens the indestructibility of the state, and whether some established social custom is so outmoded that it is time to part with it—these are issues, the two sides of which are as near together often as laughter and tears, and yet the difference may be the difference between tyranny and liberty and between government by small bodies of men and by great bodies of law.

When a court at rare intervals and with substantial unanimity decides to overturn an established precedent and does it in the spirit with which we part reluctantly with an old friend, we have for the court nothing but respect. But when a bare majority of judges develop a habit of breaking with the past and show scant regard for their predecessors or their dissenting colleagues, we indeed retain our attitude of formal respect, for the well-trained lawyer is always the gentleman, but inwardly we are sick at heart and we think rather wistfully of that wise old maxim that the known certainty of the law is the safety of all.

Well, now, Mr. President, while these tendencies and others like them cause anxiety to some of us old birds, we are by no means pessimists. Most of us are men of faith, such men as Brockington has called for tonight. What do I mean by faith? If a man's will, though feeble, inclines him to action, the highbrows say he has a velleity in a certain direction. If his will becoming stronger, he hopes for the attainment of that which he desires, a new stage in his evolution has been reached; and if his will, becoming still stronger, his hope determines him to work ceaselessly for that which he desires to accomplish, he develops a belief that his objective is attainable; and when the belief ripens into a conviction, he emerges as a man of faith. He has developed the will to win.

This, I take it, is what is meant by the author of that wonderful document, the Epistle to the Hebrews, when he says, "Now, faith is the giving of substance to things hoped for." And what we need in America today is more men of faith. You and I, day by day, meet multitudes of people who have lost faith in America or are in a fair way to lose it. They talk about the glories of the past. They lay stress upon the decadence of the present. They tell you that human kindness has departed from business, that the soul has left our public men. They say that our securities are insecure, that our currency is unsound. They point to the organized groups that are trying to subvert our constitutional system. They preach the doctrine that it is the part of wisdom to spend rather than to save.

Men and brethren, it is against that habit of mind that I raise my swan song of vocal protest. I have faith to believe that America is full of Americans who have enough common sense to prove all things and hold fast to that which is good. I know that from time to time we are betrayed emotionally into foolish courses. I know that we are led emotionally into extravagant extremes, that we are led to try unwise experiments. But in the long run, Mr. President, our common sense gets the better of us and we

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Ordered Justice Under Law Among Nations

By Honorable Orie L. Phillips
UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

Address at the American Bar Association Open Forum to discuss International Organization for Peace and Justice under Law, Chicago, Illinois, September 13, 1944.

The program states that I represent the Committee to Report on Proposals for Post-War Organization of the Nations for Peace and Law.

Therefore, it should be made plain at the outset that the views of that Committee are expressed in the Committee's report and what I shall say expresses my own views and not, perhaps, in every particular the views of the Committee.

The creation of an international organization to maintain world order now seems reasonably certain. I shall not undertake to present a blueprint for such an organization. Rather, it will be my purpose to suggest certain fundamental concepts which seem to me should be kept in mind in the formation of any plan for an ordered justice under law among the nations of the world.

Just as there are individuals who will not adhere to the principles of right and justice among men unless compelled so to do, we must assume there will be nations that from time to time will not adhere to the principles of international law and justice and will endeavor to disrupt world order. Hence, we must see to it that there shall be provided a military, air, and naval force controlled by those nations who adhere to the principles of right and justice between men and between nations, to the end that no international gangster shall ever again dare to lift his hateful head, engage in acts of aggression, oppress defenseless peoples, or plunge the world into bloody war.

But as most men prefer peace and order, so we may assume that most of the nations will prefer peace to war, especially if means are provided by which their wrongs can be redressed and their rights vindicated through peaceful processes.

But we can no more prevent controversies from arising between nations than we can between individuals.

A Substitute for Force and Violence

Hence, my basic notion is that if we may hope to prevent nations from vindicating their rights and redressing their grievances, real or imaginary, through the arbitrament of war, we must provide impartial tribunals which will entertain their complaints and afford protection for their rights and redress for their wrongs. Stated otherwise, my basic thesis is that we must find a substitute for force and violence and that such substitute is international law based on reason, right, and justice and decreed by independent international tribunals. I mean independent in the sense that the international judiciary should be an independent branch of the international organization.

For the accomplishment of these ends, I do not favor a plan for an international state. I entertain doubt both as to its practicality and its desirability. Neither do I regard as adequate an alliance between America, the British Commonwealth, and Soviet Russia, nor any plan bottomed on or which emphasizes such an arrangement.

Obviously, America, the British Commonwealth, Russia, and China must lead the way in the establishment of an association of nations. Moreover, in substituting international justice for force, the first judgment to be pronounced must be upon two international gangsters,—Germany and Japan, and there must be no doubt of its full and complete execution. I do not mean that they should be tried before and sentenced by an international tribunal. By their acts and their declarations, Germany and Japan have placed themselves in the category of international outlaws. The Allied Nations are joined together as a sort of international vigilante organization to protect themselves and other nations against Germany and Japan. They must be dealt with summarily by the Allied Nations acting as vigilantes because no other means is now provided.

International Outlaws Must Be Controlled

Only highly industrialized nations can carry on a modern war. When an individual commits a serious offense against society, we put him under restraint, deprive him of the means to commit crime, and when we release the restraints, we put him on probation or parole. When a nation becomes an international gangster, it should be treated likewise. Germany and Japan must be thoroughly beaten. They must be dis-

armed, and, in my judgment, sufficiently non-industrialized to insure their inability to again wage wars of aggression. And these must be more than mere treaty requirements. The Versailles Treaty provided for disarmament of Germany and for inspection. None of the Allies, except France, paid any attention to the requirements and she too late. Then England refused to join with France in requiring obedience. Germany was permitted to drill with sticks on the theory that such a force was not an armed force. I would not permit Germany or Japan to make a single warship, aeroplane, or motor-driven vehicle, much less the ordinary armaments. An inspection force should be provided that would insure prompt knowledge of any failure fully to comply with the restraints. Avoidance of the requirement to remain disarmed should not be permitted by mere technical distinctions. Means should be provided for compelling complete obedience.

If that be done and America, the British Commonwealth, and Russia will agree to maintain peace among themselves and other nations, our security and the peace of the world are reasonably assured for a substantial period, primarily because no other nation is now, or is likely in the near future to be, sufficiently industrialized to carry on a modern war.

Moreover, it will, of course, take time to work out a permanent plan for the maintenance of world order and for substituting a rule of reason, right, and justice for that of might and force. During the transition period, the cooperation of America, the British Commonwealth, and Russia to maintain the peace of the world will, of course, be necessary.

It may also be true that such an arrangement would bring about a long period of peace. Nevertheless, I am firmly convinced that we can only hope to prevent war by providing through international tribunals for the settlement of international controversies upon the principles of right and justice, with sufficient force behind such tribunals to compel respect and obedience to their decrees. There are many nations with tremendous potentialities for industrial development, with great resources of raw material and unlimited man power, notably India. Those nations may awaken. The portents point in that direction. With the industrialization of Asia would come the power to wage war. Ambition for racial supremacy or strains due to jealousies, prejudices, and economic competitions between the white and yellow races might breed war in a world where no other means than force is provided for the enforcement of international rights and the redress of international wrongs, even though power is being employed to maintain peace.

Impartial Tribunal a Substitute for the Arbitrament of Arms

Moreover, it seems to me that permanent world peace must rest on a firmer foundation than benevolent power to be exercised by three nations which happen today to be most powerful. The other nations of the world will not, in my judgment, be content to intrust their destiny to three or more world policemen, regardless of how earnestly those policemen affirm their adherence to the principles of the Atlantic Charter. They will feel secure only when war is outlawed and there is substituted for the arbitrament of arms, the judgments of an impartial tribunal. No police force, however powerful and however benevolent, could permanently maintain peace and order among individuals through sheer power. If a member of a family is assaulted and ravished, we may be sure the family would avenge the wrong, were it not assured the wrongdoer would be adequately dealt with under a system of criminal justice. Would we hesitate to use force to protect our civil rights or redress our civil wrongs at the behest of a policeman of a sovereignty to which we owe no allegiance, were not judicial tribunals open to us wherein we may lodge our complaints, obtain a hearing, and obtain a decree that will vindicate our rights and redress our grievances?

Moreover, the effect of merely preventing aggression through power might not be altogether wholesome. Some nations, were they assured of protection from aggression, might become arrogant in their treatment of other nations. This would not be true if they knew they could be called to account before an international tribunal and subjected to sanctions by the decree of that tribunal for their international wrongs.

If America, the British Commonwealth, and Soviet Russia will agree to live in peace and will effectively deprive Germany and Japan of the means of again waging wars of aggression, the nations of the world will experience a new feeling of security and a hope for permanent peace. But from time to time international controversies are bound to arise. If we are to maintain peace, does it not follow that we must provide means for their peaceful adjustment in accordance with principles of right and justice and means to enforce such adjustments?

Nations Must Be Accorded Fair and Equitable Representation

If we are to accomplish world order, nations, both great and small, must be accorded an opportunity to live in a world regulated by the principles of right and justice and not dominated by might. The smaller nations must be accorded a fair and equitable representation. They must be given an effective voice in the international organization. All nations must be given reasonable access to raw materials and to acquire them in fair and open markets, and a fair opportunity to participate in international trade and intercourse. Trade embargoes must be prohibited and international trade must be freed from unreasonable artificial barriers. We cannot hope to prevent war with armaments if we permit economic warfare and economic strangulation of weaker peoples.

If the rights of nations are to be vindicated and controversies between

nations settled by peaceful processes, there will be need for an authoritative statement of the principles of international law. Aside from conventional international law resulting from compacts between nations governing only the rights of the parties to such compacts, international law has its source in abstract reasoning, custom, and usage, the conclusions of publicists based on ancient and admitted practices, and judicial precedents. Unfortunately, the principles of international law are rather shadowy. In many respects they have never been authoritatively established and they are only obligatory to the extent that considerations of morality, commercial advantage, and fear of hostile attack persuade adherence thereto.

International Organization Should Not Have Legislative Powers

It does not seem to me that we should, and I gravely doubt that we would, delegate to a legislative body in a world organization power to enact a code of international law binding on us. That would involve the surrender of our national sovereignty and the adoption of a fundamental charter limiting and defining the extent of the legislative power of such a body in a world organization. It would also involve the difficult problem of determining and agreeing upon the number of representatives each participating nation should have in such a legislative body. Moreover, the principles should be stated in broad outline, rather than in the conventional detail of a code or statute, with the exception of codes dealing with international trade and commerce. And, finally, members of a legislative body proceed on the theory that they represent a particular constituency and must weigh legislative proposals in the light of their effect upon the individual, and sometimes selfish, interests of their constituents. There may be other objections, but these seem to me to present sufficient reasons why the international organization should not be vested with legislative powers.

Nations Adhering to Formulated Principles Entitled to Benefits

Nevertheless, it seems to me that we must devise a means of making the principles of international law more certain, clear, and positive. My notion is that the participating nations should create a body patterned after the American Law Institute to formulate and state broadly the controlling principles of international law. It seems to me that such a body would approach the problem with a broader and more impartial point of view than would legislative representatives. After such a statement of the principles of international law had been formulated and adopted by such a body, in accordance with conventional international practice, it would be submitted to the respective nations and it would be binding upon those nations which agree to adhere thereto. Only nations that bound themselves to adhere thereto should be entitled as of right to the benefit thereof. Thus, our adherence would be in accordance with the traditional exercise of the treaty-making power in accordance with constitutional requirements. The judicial tribunals of the world organization would decide international cases and controversies in accordance with the formulated principles of international law to which the nations involved had agreed to adhere.

Of course, we would have to intrust to such tribunals the power of interpretation. But a judicial body traditionally approaches the issues presented, not in any sense as in a representative capacity, but as an impartial instrumentality free from bias and prejudice, or interest in the result to be attained, and with the view of doing complete and exact justice in accordance with controlling principles of law. To such a body, it seems to me, we should and would be willing to submit the power of interpretation of the statement of principles of international law.

Of course, a world organization would have to have an administrative branch. While I would not endow the executive council or the representative assembly with legislative power, I would authorize it to impose sanctions, and, if need be, resort to naval, military, or air force to prevent aggression and to enforce the decrees of the international tribunals. It seems to me that we will need more than a consultive formula for the use of force to prevent aggression and preserve order in the world. Our experience under the League of Nations demonstrates, I think, the inadequacy of such a formula.

Some will no doubt assert that what I suggest involves some surrender of national sovereignty. But the surrender is one of form rather than of substance.

An Act of Sovereignty Defined

We have seen twice in the last twenty-five years that it is impossible for America to remain aloof or avoid being brought into these recurring world conflicts. It is an act of sovereignty, not a surrender thereof, to engage in war. It is an act of sovereignty, not a surrender thereof, to enter into an international arrangement to provide a substitute of peaceful processes for war, to create a world order based on law and justice as a substitute for world anarchy. It is a question of how we shall exercise our sovereignty not of its surrender, if we face the facts and view the alternatives objectively.

Liberty is not the exercise of unbridled will. It implies the existence of an organized society maintaining public order without which liberty would be lost in the exercise of unrestrained abuses. To agree to adhere to the principles of right and justice among nations, maintained through an international association maintaining international order, is not a surrender of our national freedom. It is a substitution of ordered liberty among nations for international anarchy.

At the beginning I would narrow-

ly define the non-consent or obligatory jurisdiction of the international tribunals and limit such jurisdiction to controversies of a character most likely to disturb the peace of the world or to provoke acts of aggression. I have chosen the term "non-consent" for the want of a better one. By it I mean the power to decide controversies between nations on the complaint of one without the consent of the other. I would broadly define the consent jurisdiction, that is, the jurisdiction with respect to disputes voluntarily submitted and hope that, in the light of experience with such tribunals, the nations would be willing from time to time to broaden the non-consent jurisdiction. Our goal will not be quickly attained. It will take years, perhaps decades, of patient effort. I would make the judgments of the international tribunals entered in matters within their non-consent jurisdiction final and binding and would enforce them, if need be, by a military, air, and naval force provided to maintain world order, to prevent aggression, and to compel obedience to the decrees of the international tribunals.

In my thinking on these problems I have tried to be realistic and practical. I do not hope to prevent controversies and conflicts. Competition is a necessary stimulant to advancement and progress. Neither do I envision a world entirely free from disorder. I would not want to live in a civilization where men would not fight, if need be, for great principles and for their freedom and independence. We know that men will defend their lives, their families, and their homes, and we recognize the right of self-defense and even justifiable homicide. Nevertheless, we provide laws against assault and murder, and courts to adjudge and inflict penalties for wrongs, and means to enforce such judgments and penalties. And it does seem to me we can provide a system of law for nations, means to redress international wrongs and enforce international rights by peaceful processes, bring about ordered international freedom and justice under law, and in a substantial degree prevent aggression and armed conflict.

Our Profession's Greatest Challenge

I have only undertaken to state these objectives to be attained in broad outline. The means for their accomplishment will demand the best brains and the best thought of the great leaders in the democracies. There will be a need for men of clear vision, indomitable courage, and adventurous spirit. In their accomplishment, the lawyers and the judges of the world must take a leading part. We are trained and experienced in the settlement of disputes between government and the citizen and between citizens by the processes of reason and justice, through judicial and other tribunals. In the setting up of these international tribunals and in making provision for their functioning, the world will look to lawyers and judges, as well as to statesmen and economists. It will present to the lawyers and judges of America and of the world the greatest challenge that has ever come to your profession and mine.

The task is truly great; the difficulties almost insuperable. But surely there lies within the abilities of the leaders of our Christian civilization a plan to prevent these recurring cataclysms of world-wide war. Above all, it will be our obligation to the brave men and women of America who make the supreme sacrifice to give our best thought and our best efforts to the accomplishment of that end. In approaching the problem, a determination to succeed will be of supreme importance. May God grant that America in the future shall be, as she has been in the past, characterized by the hope, the faith, and the indomitable will to succeed that accomplishes the apparently impossible.

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lawyers—no such challenge as that which comes to you tonight.

"And in the doing of my humble job trying to help to preserve this as one spot on this earth where men have a right to be free, this thing which you have done for me tonight, while I appreciate it as a personal compliment, far beyond that, men and women of this great organization, I am grateful to you because I am conscious of the fact that this thing which you have done to me and for me will help me, effectively help me, in what I am trying to do.

"Words fail me. I cannot properly express my appreciation and my gratitude. But I am going to try to demonstrate it in the days to come, as I work with you in the effort to preserve this great democracy as a heritage to the generations to come." (Prolonged applause)

In the course of his address later in the evening, Ex-Senator George Wharton Pepper, himself a recipient of the Association's Medal, acclaimed the award to Judge Sumners.

George Wharton Pepper Acclaims Judge Sumners

"As to Hatton Sumners, I echo everything that Judge Ransom has so eloquently and so truthfully said of him," declared Mr. Pepper. "He is a worthy addition to the list of those who have received your Medal; and on behalf of that little group, I welcome him to that goodly company, and between you and me, I express the thought that his coming serves a little to raise the average, which I think was a bit debased when I was admitted to it a few years ago." (Laughter)

Many members of the large audience took individual opportunity later to greet and felicitate Judge Sumners, and to assure him of their hearty support of his non-partisan efforts to maintain constitutional government as the foundation for American jurisprudence.

Resolution in Tribute to Frank J. Hogan

by Walter P. Armstrong
OF THE TENNESSEE BAR
FORMER PRESIDENT OF THE AMERICAN BAR ASSOCIATION

At the opening session of the Assembly on September 11, Walter P. Armstrong was recognized by President Henderson to offer this memorial resolution in tribute to the late Frank J. Hogan, a former President of the Association. The resolution was adopted unanimously, through the action of the members of the Assembly in rising and standing for a few moments of silent tribute, in accordance with the long custom of the Association.

For a few moments we put aside the business of the day to pay deserved tribute to one who by his presence so often enhanced the pleasure of these meetings and who by his work contributed so much to the welfare of this Association. This is not the occasion to attempt to outline even briefly the notable career of Frank Hogan. That has already been admirably done, in the columns of the JOURNAL, by one of our members who knew him best (A.B.A.J., July, 1944; pages 393-395).

It is fitting, however, that we, his friends, while so keenly conscious of our loss of him, should attempt here to voice the feeling which in common we share. We like best to remember him as a friend who was never too preoccupied or too troubled to greet us with a genial smile, who never left the sympathetic letter unwritten or the gracious word unspoken.

This genius for friendship—sincere and unforced—was innate in Frank Hogan's character. It was not the gay camaraderie of one for whom, by the travail of others, the path of life had been well smoothen. It was the spontaneous expression of one who, knowing and forgiving their foibles, truly loved his fellow men.

Equality of Opportunity Was All He Ever Had

It was inevitable that Frank Hogan should have believed that all to which any lad is entitled is an equality of opportunity. That was all he had ever had and he felt no regrets. His shining success came from his own efforts—the result of natural ability and indefatigable labor. His life fitted into what we like to call the American tradition—nothing gratuitously bestowed—all arduously achieved.

His thoroughness, his power of analysis, his detachment and his ability to read aright the omens of the times, made him a safe adviser. His preparation, his knowledge of human nature, his power of instantly mobilizing all his resources, his jovial wit, his gift as a raconteur, his restrained eloquence, his unbounded courage, made him a highly effective advocate, and won for him many victories in the courtroom. In addition to heading a firm engaged in a varied general practice, he participated in many sensational cases; and not a few of his exploits will take their places among the legends of the profession.

He was always a lawyer. He never held or sought public office; indeed, few lawyers have better exemplified the function of the independent Bar. Nothing enlisted more of his strength or aroused more of his zeal than resisting what he conceived to be encroachment by the government on human rights, particularly against individual clients, rich or poor, powerful or friendless.

He Gave Himself to His Country and His Profession

The honors he valued most were those bestowed by his brother lawyers. The presidency of this Association he considered the culmination of his career. In performing the duties of his office he did not spare himself. To them he devoted all of his time, and put forth efforts which overtaxed his strength and sapped his health. In this he had no sense of sacrifice, for nothing was closer to his heart than the advancement of the profession he loved so well.

Moreover, he was gravely concerned about the future of his country, and welcomed the opportunity to arouse others to contend against dangers which he foresaw. Far earlier than most men, he realized that the time was approaching when Congress and the legislatures rather than the courts would have to bulwark the Constitution and try to keep govern-

Continued on page 592

John Marshall Harlan · *Portrait of a Great Dissenter*

by George R. Farnum

of Boston

FORMER ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES

This is the twenty-second in a series of biographical studies of eminent soldier-lawyers written by Mr. Farnum for the Journal.

A French critic has asserted that the character of a man is the result of heredity, environment and the particular time when he appears upon the stage of life—and that his destiny is determined by the point where these three elements conjoin. John Marshall Harlan came of an ancestry which he could trace back to a Quaker immigrant who settled in Delaware in 1687, and who was the progenitor of a hardy and self-reliant line of descendants. He was born in Boyle County, Kentucky, on June 1, 1833. His father could boast a distinguished career both at the bar and in public life. He was influential in the Whig councils of Kentucky and had served in Congress and as Attorney General of his state. Incidentally, he seems to have displayed some prescience when it came to the naming of his son. Young Harlan came upon the scene as the pioneer era was drawing to a close in Kentucky, and grew up and entered into manhood during a time of rising passions which led to civil war—a war which was to be followed, first by the confusion and bitterness of reconstruction, and thereafter by the retarded beginning and accelerated tempo of the industrial revolution in America. By these factors his character was formed; from their conjunction his destiny was determined.

Harlan was graduated from Centre College at Danville at the age of seventeen. Preordained for the law, he began its study at Transylvannia University at Lexington, being admitted to the bar in 1853. Five years later he was elected judge of the local county court for one year. The political excitement of the times, however, caught him up in its contagion, and the following year he made an unsuccessful run for Congress. In 1861 he removed to Louisville, where he formed a law association with W. F. Bullock.

As the clouds of war began to overspread the national horizon, Harlan found himself in a difficult position. Kentucky was racked by radical and violent differences of opinion over the great issues which divided the country. Though a slave-owning Southern gentleman, he was a true namesake of John Marshall and attached to the Union. His conservatism, however, restrained him from joining the exodus of Whigs into the newly formed Republican Party. His father was a staunch Union man, who was to throw all his influence on the side of those who were to keep Kentucky out of the ranks of the seceding states, and in May, 1861, was to actively collaborate in formulating plans to distribute the "Lincoln guns" to local Unionists —thereby earning the gratitude of Lincoln and the appointment of United States district attorney for Kentucky. The son, however, adopted the median course of supporting Bell and Everett, the Constitutional Union candidates in the critical election of 1860, and served as presidential elector on that ticket. Four years later he actively supported the presidential aspirations of General George B. McClellan. He bitterly resented the adoption of the Thirteenth Amendment and characterized the abolition of slavery by federal action as "a flagrant invasion of the right of self-government." At this point in his career it would have taken an astute reader of his stars to have forecast the future which lay in store for him.

At the beginning of the war he recruited and commanded an infantry regiment which was incorporated into the division then commanded by George H. Thomas, the great Virginian commander who cast his fortunes with the North. He served in the field until his father's death in the middle of the war, when he resigned his commission and returned to civil life. At the time, his appointment as brigadier general was under consideration at Washington. His letter of resignation to General Rosecrans gives no very convincing reason for leaving the army during the critical year of 1863, and there may be two opinions as to whether the best side of Harlan was reflected in this action. In any event,

hardly was he out of military service than he was in public office—the attorney generalship of his state. He went back to private practice in 1867.

With the end of the war and the local Republican defeat in 1866, Harlan seemed to see a new light. Repudiating the action of most of his conservative friends in deserting the Republican fold, he promptly aligned himself with that radical wing which he had previously opposed. He took no half measures, and in the next presidential campaign, in which he supported Grant, he had so far revised his earlier views that he strongly defended those very war amendments toward which he had earlier shown such hostility.

And now in the unfolding scheme of things which was working out his destiny, Harlan was chosen as head of the Kentucky delegation to the Republican National Convention. Pledged to support Bristow, when that candidate's strength began to wane Harlan threw the support of the delegation to Hayes, thereby contributing to the latter's nomination. So Harlan earned the gratitude of the man who became President. A month after Hayes' inauguration Harlan was appointed on a commission to straighten out the political muddle in Louisiana and to pave the way for the immediate restoration of civil home rule. This work was performed to the eminent satisfaction of the President. In the fall Harlan was appointed Associate Justice of the United States Supreme Court. At last there was another John Marshall on the nation's highest tribunal—and in the footsteps of his predecessor Harlan was to travel for the almost thirty-four years which remained of his life. In connection with his appointment, it is not without interest that Hayes was to confide to his diary, "The most important appointments are judicial. They are for life, and the judiciary of the country concerns all interests, public and private," concluding, "my appointments will bear examination."

Harlan took his place on the Supreme Court at the beginning of an era of unprecedented industrial expansion and profound economic changes. By character, ability and opportunity, he was cast to play a conspicuous rôle in adjusting constitutional principles to the radically new conditions in American life. The record of his judicial service is contained in 126 volumes of the reports. He wrote 703 opinions of the Court. It is, however, as the first of the great dissenters on the Court that he is principally remembered. Daniel, who preceded him, had established an unique reputation for disagreement with the majority of his associates, but most of his dissents had been in support of slavery and States' Rights and played no part in elaborating the constitutional structure. From first to last Harlan wrote 316 dissenting opinions. In no few of these cases time was to be on his side, as was to prove the case with Holmes, Brandeis, Cardozo and Stone, who followed him. His dissenting opinion in the Knight case was in the end to prevail with the Court. A constitutional amendment established his ideas on federal income taxation. His divergent views on the validity of congressional legislation prohibiting the transportation of alcoholic liquors into dry states ultimately came to be in principle the law. The years which followed have vindicated his disagreement in the New York bakers' case.

He was a man of commanding physique, of dominating mind, and of forceful manners. He bestrode the world like a Colossus, standing six feet two in height, weighing 240 pounds in his prime, and evidencing a superabundance of vitality in all his movements. He retained his robust energies to the end. The story is told that during a ball game between members of the Court and a team recruited from the bar, the Justice stepped up to the plate and drove the ball into the outfield for three bases. He was then seventy-five years of age! Deep seriousness and moral earnestness were stamped upon his strong countenance, and his massive brow, accentuated by baldness, bespoke great power of intellect. He possessed a big voice with the pitch and resonance of a deep-toned bell. He was a severely religious man of Presbyterian persuasion. The Bible—in which he conducted classes for many years—was his moral guide as the Constitution was his political gospel. Justice Brewer once observed, "Harlan retires at night with one hand on the Constitution and the other on the Bible, safe and happy in a perfect faith in justice and righteousness."

A sense of the prestige and dignity of his office, and the importance and responsibility of his work, ruled his manner while on the bench. Off the bench, however, he was informal, cordial and democratic, and was a popular and conspicuous figure in the social life of Washington of his day.

A man of militant individualism, he either led others or went his own way. He lacked the temper of a negotiator, and he never acquired the art of a compromisor. His own convictions were so tenaciously held and backed by such an inflexible sense of duty that he resented conflicting views and fought them to the bitter end. These traits were strikingly reflected in the number and character of his dissents and at times, be it added, in the manner of their delivery. In the Income Tax cases he found an outlet for his feelings by violently pounding the desk before him, glaring belligerently at the Chief Justice and Justice Field and, it is said, by shaking his finger accusingly in their faces. With a countenance flaming with indignation he hurled such fulminations against the majority opinion as "If that is the Constitution, the Constitution cannot be amended too quickly." "This decision may well excite the gravest apprehension." "On my conscience I regard this decision as a disaster." Yet, withal, he was both esteemed and liked by his associates. Some years after his death, Holmes, who was never a hero worshipper, passed this judgment on him in a letter to Sir Frederick Pollock, "That sage, although a man

of real power, did not shine either in analysis or generalization and I never troubled myself much when he shied," adding as a cryptic touch, "I used to say that he had a powerful vise the jaws of which couldn't be got nearer than two inches to each other."

To Harlan's legal philosophy and constitutional principles nothing more than the most sketchy reference is here possible. Generally speaking, he approached judicial problems with what Chief Justice White ponderously described in him as—

> a purpose to do justice as it was given him to see it, a justice not resting upon mere metaphysical conceptions or distinctions of casuistry concerning the lines of separation between right and wrong, but a justice based upon what seemed to him to be a common sense of justice, begetting an ever-present and vivid purpose to uphold the right and to frustrate the wrong, and ever to see to it that the weak were not mastered by the strong.

He had a deep and abiding faith in American constitutional institutions, perused Madison's debates with reverence, and read into the Great Charter the widest grant of power to the federal government consistent with the language employed and what he deemed the fundamental intent behind it. He had little patience with what he called "a subtle and ingenius verbal criticism." His opinions construing the scope of the national control over interstate commerce afford some of the best examples of the spirit and character of his reasoning on constitutional issues, though it may be thought that the prejudices of the rigid Sabbatarian unduly influenced the constitutional lawyer when he came to deal with Georgia legislation prohibiting the movement of freight on the railroads on the Lord's Day.

He believed that it was no part of the Court's function to legislate, and in his dissent in the Standard Oil case he characterized the action of the majority in writing the word "reasonable" into the anti-trust statute as a "blow at the integrity of our governmental system, and in the end will prove most dangerous to all."

In Harlan the recently emancipated Negro found a strongly articulate champion. His dissent in the Civil Rights cases was characterized by Roscoe Conkling in a letter to him as "the noblest opinion in the history of our country, great in learning and understanding of our system of government and great in statesmanship." Curiously enough, Harlan was the only Southerner on the Court at the time—and a slave owner in ante-bellum days at that! He rendered yeoman service in discrediting the "natural rights" philosophy which Justice Field strove to engraft upon American constitutional principles. He was jealous in guarding property rights from what he deemed state or federal impairment, and believed that a public office holder had a vested interest in his job.

In his passing an unique personality and a distinct type disappeared from our highest Court. As Holmes, with his faculty for suggesting at times a good deal in a somewhat inelegant manner, said of him, "He was the last of the tobacco-spitting judges." For about twenty years he found the time amid the exactions of his judicial work to conduct law classes at Columbian (now George Washington) University. It was by no coincidence that his lectures were on constitutional law.

He clearly recognized the leading rôle played by the bar in the national welfare, and the importance of its collaboration with the courts in the determination of litigation. At the centennial celebration of the Supreme Court in 1890, he gave utterance to his convictions in these memorable words:

> I name the lawyers with the bench, because upon them, equally with the judges, rests the responsibility for an intelligent determination of causes in the courts, whether relating to public or to private rights. As the bench is recruited from the bar, it must always be that as are the lawyers in any given period, so, in the main, are the courts before which they appear. Upon the integrity, learning and courage of the bar largely depends the welfare of the country of which they are citizens; for, of all members of society, the lawyers are best qualified by education and training to devise the methods necessary to protect the rights of the people against the aggressions of power. But they are, also, in the best sense, ministers of justice. It is not true, as a famous lawyer once said, that an advocate, in the discharge of his duty, must know only his clients. He owes a duty to the court of which he is an officer, and to the community of which he is a member. Above all, he owes a duty to his own conscience. He misconceives his high calling if he fails to recognize the fact that fidelity to the court is not inconsistent with truth and honor, or with a fearless discharge of duty to his client.

He died at the Capital on October 4, 1911, after a brief illness. At the time he was seventy-eight and the oldest man in years on the Court. He had served longer than any justice before him with the exception of Marshall and Field, whose records exceeded his by a matter of months only. With these exceptions that record stands to the present day.

Amendments to the Federal Rules of Civil Procedure

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The time within which the Supreme Court Advisory Committee on Federal Rules of Civil Procedure will receive suggestions from the bench and bar about amendments to the rules has been extended to December 15th.

Suggestions should be mailed to the Committee at the Supreme Court of the United States Building, Washington 13, D. C.

Additional printed copies of the pending proposals are available at the Committee's office in Washington.

Association Officers Are Elected and Inducted

The election of officers of the Association for the year beginning with the adjournment of the 1944 Annual Meeting took place Thursday afternoon at the concluding session of the House of Delegates. The nominations made by the State Delegates in February were not opposed by independent nominations made by members of the House or of the Association by petition. All elections were accordingly unanimous. The widely separated parts of the country from which the elected officers come attest the representative character of the Association's leadership.

David A. Simmons, of Houston, Texas, was elected President of the Association.

Tappan Gregory, of Chicago, was chosen for a two-year term as Chairman of the House of Delegates.

Harry S. Knight, of Sunbury, Pennsylvania, was re-elected as Secretary.

John H. Voorhees, of Sioux Falls, South Dakota, was re-elected as Treasurer. As to him, the authorized statement had been made to the State Delegates on February 29 that he would not be a candidate for election for a further term, thereby bringing to a close in 1945 his long and highly competent and devoted services as custodian of the Association's finances and member of the Board of Governors.

Members of the Board of Governors Are Elected

At the opening session of the House of Delegates, in accordance with the constitutional requirement, three members of the Board of Governors were unanimously elected, as follows:

Fourth Judicial Circuit: Judge Frank C. Haymond, of West Virginia;

Seventh Judicial Circuit: Eli F. Seebirt, of Indiana;

Eighth Judicial Circuit: A. W. Dobyns, of Arkansas.

The new members of the Board of Governors took office at the first meeting convened by President Simmons, on Friday morning, September 15.

Assembly Delegates Are Elected

Four Delegates to represent in the House of Delegates for a two-year term the general membership of the Association were elected by the Assembly. The nominees at the opening session of the Assembly were Messrs. Willis Smith, of North Carolina; Charles M. Hay, of Missouri; Guy Richards Crump, of California; Joseph D. Calhoun, of Pennsylvania; Carl V. Essery, of Michigan; and John Kirkland Clark, of New York.

As in recent years, the voting for these much-prized offices took place through the use of ballot boxes and printed ballots. The outcome of the election for the four places was as follows:

Guy Richards Crump 232 votes
Willis Smith ..... 225 votes
John Kirkland Clark 205 votes
Charles M. Hay.... 204 votes

The foregoing were declared elected.

Services of Chairman Crump Are Acclaimed

At the concluding session of the House of Delegates, State Delegate Charles M. Hay, of Missouri, arose to express the universal feeling in the House, as the three years of service by Guy Richards Crump, of California, as its presiding officer, neared its closing moments. First Mr. Hay caused laughter by "apologizing" to the House for the "farewell speech" he had made the day before, on the assumption that he wouldn't be chosen to remain a member of that body.

"I want to congratulate the House," declared Mr. Hay, amid applause, "not upon your kindness and consideration in tolerating me again, but upon the vote you gave a gentleman who has served this House with fine ability, with fairness, with courtesy at all times when the circumstances permitted courtesy (laughter), who has been diligent in all things, promoted the business of the House with great efficiency, one who has endeared himself to all of us, and who, I know, will have the affection of every member of this House in the days that lie ahead, and whose presence among us as a member for the next two years, will be a source of great pride and gratification and comfort to us all.

"In your wisdom you gave him the highest vote of any of the candidates, thus reflecting your admiration for him, and your eagerness to have him with you, and, as a member of the House, I want personally to express my pride and pleasure in the prospect of continued association with Guy Crump."

The members of the House arose and applauded, in hearty endorsement of Mr. Hay's expressions of approval and good will.

Having laughingly ruled Mr. Hay "out of order," Chairman Crump turned to President Henderson and said, with deep feeling: "In yielding the gavel to you for the last time, I trust you and the members of the House will not misunderstand me

when I say that I do so with mingled feelings of reluctance and relief. May I place on record my profound appreciation of the honor and privilege which I have enjoyed, of presiding over the deliberations of this distinguished, able, and representative body of the lawyers of the United States?"

President Henderson responded by saying to Chairman Crump that "I can add but little to what has been said by Charley Hay, as he always says things well and from the heart; but in going, you and I will go down the steps together, and very shortly. In so doing I am very glad to be one of those to go with you, because by your zeal, by your industry, and by your intelligence, you have set a goal, a goal in which your illustrious predecessors had nearly reached the heights, but this House of Delegates will long remember you as one of its most distinguished members, a fair presiding officer, but more particularly as our friend." (Applause)

The newly elected officers were presented, inducted, and most warmly greeted, at the ensuing session of the Assembly. The remarks of Retiring President Henderson and Incoming Chairman Tappan Gregory, together with the induction address of President David A. Simmons, before that body, are separately reported elsewhere in this issue.

At the first meeting of the new Board of Governors, convened by President Simmons on September 15, Joseph D. Stecher was re-elected as Assistant Secretary for the ensuing year, and Olive G. Ricker was re-elected as Executive Secretary.

Thirty-Nine States Ask for a Rehearing on Insurance Decision

A joint petition by thirty-eight states was filed in the Supreme Court of the United States on September 20, for a rehearing in the controversial insurance case in which the Court ruled last June that insurance is interstate commerce subject to the federal anti-trust laws and regulations. A similar petition had been filed by the State of New York a week before.

The joint petition argued that the effect of the holding that insurance is commerce is to strike down the existing systems of state regulation without providing a substitute until Congress enacts legislation.

The states urged reconsideration because "of the far-reaching and disruptive effect of the decision in this case upon the interests of the states and the problems of law enforcement presented by the decision which we feel was not foreseen by the Court or given sufficient consideration."

The joint petition also asked that the Justices who previously disqualified themselves should reconsider their disqualification "in the light of the paramount interest of the states in the question" and that no decision be made unless it is concurred in by a majority of the whole Court. Many lawyers have interpreted the decision of the Court as having been rendered by a vote of four to three. The Assembly and the House of Delegates of the American Bar Association voted on September 14 to express the views of the Association as favoring a majority vote of the whole Court on constitutional questions. In reporting and quoting from the petition filed by the states, the JOURNAL expresses no opinion as to how many members of the Court were of the view that the insurance business as presently conducted is interstate commerce under the Constitution. The applicability of the Sherman Anti-trust Act to the insurance business, if it is interstate commerce, is a statutory question. Both issues are now before the Court, on the petitions for a rehearing.

"This Court, in holding that the Sherman Act applies to the business of fire insurance," declared the petition, "has denied the philosophy of state regulation by substituting the principle of unrestricted competition for regulation to insure solvent insurance at reasonable and nondiscriminatory rates based upon a determination of the hazard assumed. The Court has produced this result for the forty-eight states upon the theory that Congress so intended, although Congress has enacted legislation for the District of Columbia which adopts the philosophy of state regulation."

The joint petition contends that the Court could have avoided the problems now raised for the states had it merely said that the business of insurance is subject to federal regulation, and left to Congress the enactment of appropriate legislation. "A transfer from state regulation to federal regulation or to a combination thereof, to the extent desired by Congress, could so easily have been effected without the burden imposed upon the states by this decision, and in no event, pending this transition, was it necessary to strike down the system of state regulation by holding that the Sherman Act applied to the business of insurance," the states[1] contended.

1. Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wisconsin.

Practising lawyer's guide to the current LAW MAGAZINES

Those who examine this department to see if any of the articles currently described may be of help to them in their professional work should take into account the fact that printing and editorial difficulties often delay the publication of an issue of a law magazine considerably beyond the month to which it is accredited. The Editors of this department make it their practice to review an article in the next issue of the JOURNAL after the magazine containing it has been received. The Editors renew their expressions of hope that lawyers in active practice will, to an increasing extent, be asked to contribute, and will be willing to contribute, their experience, in the form of articles in the law periodicals, perhaps particularly in the many specialized fields of administrative law and procedure. These should not be left wholly to the employees of the agencies concerned. This department can enumerate only such articles as are published in the law magazines and appear likely to be useful to practising lawyers.

AGENCY—*Unforeseen Emergencies and Acts of Strangers—Agency of Necessity: The Canadian Bar Review* for June and July (Vol. 22—No. 6; pages 492-508) contains an exposition of "Agency of Necessity", by Walter B. Williston of Toronto. It is described as a prize essay for 1944 at the Osgoode Hall Law School. It reviews authorities, principally English, on three types of situations which are considered to involve agency of necessity; viz.: (a) Where an agent because of some unforeseen emergency assumes powers which except for the exigency would be beyond his authority; (b) where one person fails to fulfill a legal obligation to another, and the obligee then does or causes to be done some act to protect himself from the consequences of the failure; and (c) where a stranger, without any authority but because of some emergency, does some act for the benefit of another. The author devotes special attention to type (c), for the purpose of showing that Roman Law concepts of rights and liabilities under the rule of the *Negotiorum Gestio* may in limited situations have some influence upon the development of English Law. (Address: The Canadian Bar Review, Osgoode Hall Law School, Toronto 1, Ontario, Canada; price for a single copy: 75 cents).

CONSTITUTIONAL LAW—*Impairment of the Obligation of Contracts—"The Supreme Court and the Contract Clause":* The third and concluding article of Professor Robert L. Hale's study of the "contract clause" of the Constitution is in the July issue of the *Harvard Law Review* (Vol. 57—No. 6; pages 852-892). For reference to the earlier installment see 30 A.B.A.J. 472. The concluding article covers the existence and extent of obligations as a federal question of state law, the origin and development of the doctrine that not all impairments are unconstitutional, and contract impairment and due process. (Address: Harvard Law Review, Gammett House, Cambridge, Massachusetts; price for a single copy: 75 cents).

CONSTITUTIONAL LAW—*Scope of Judicial Review—"Due and Democratic, Process of Law":* Charles P. Curtis, Jr., a partner in the firm of Choate, Hall and Stuart, in Boston, writes in the March issue of the *Wisconsin Law Review* (Vol. 1944—No. 2; pages 39-52) an analysis of developments in the Supreme Court of the United States, as presently constituted, concerning the approach to judicial review of statutes and administrative orders. He emphasizes the opinions of Mr. Justice Frankfurter, and concludes that where the deliberations of the legislative branch are carried out in a democratic way, the Court is inclined to exercise "self restraint" in substituting its judgment on the merits of the legislation in question. (Address: Wisconsin Law Review, Madison, Wisconsin; price for a single copy: 75 cents).

DESIGN PATENTS—*Copyright—"Design Piracy":* The design-protection problem, particularly in relation to the garment and textile industry, formed the basis of an article by Maurice A. Weikart in the April issue of the *Indiana Law Journal* (Vol. 19—No. 4; pages 235-257). It

Editor's Note: This department provides a means by which practicing lawyers may find if the current law reviews and other law magazines contain material which may help or interest them, primarily as assistance in their professional work.

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL *will endeavor to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of a current article.*

is indicated that all attempts to control design copying by legal means, through recourse to the Design Patent and Copyright Laws, the law of unfair competition, and direct legislation, are to be regarded as having proved to be abortive, and that the Supreme Court's decision in the *Fashion Originators' Guild* case (312 U.S. 457) has virtually eliminated the possibility of solving the problems by extra-legal means. (Address: Indiana Law Journal, 38 Maxwell Hall, Bloomington, Indiana; price for a single copy: 75 cents).

EMINENT DOMAIN—*Compensation for Removal Costs:* A note in the June issue of the *North Carolina Law Review* (Vol. 22—No. 4; pages 325-333), commenting favorably upon the recent decision in *General Motors Corp.* v. *United States,* 140 F. (2d) 873 (C.C.A. 7th, 1944), reviews at length various federal and state court decisions which allow or deny compensation for removal costs in condemnation proceedings. (Address: The North Carolina Law Review, Chapel Hill, N. C.; price for a single copy: 80 cents).

EMINENT DOMAIN—*Procedure—"Condemnation Procedure During World War II":* Erratum in our August issue: Through a regrettable error in typing, in our August issue, the name of the author of the article on the above subject, in the April number of the *George Washington Law Review* (Vol. 12, No. 3; pages 286-301) was incorrectly given. The author was Carolyn Royall Just, who is to publish soon a second article on the same subject.

EVIDENCE—*Presumptions—Explanations to Jury—Burden of Proof:* The effects of a statutory presumption, and how far it should be explained to the jury in a particular case, are points considered in a concise but illuminating comment in the June issue of the *Oregon Law Review* (Vol. 23—No. 4; pages 269-273). Professor E. M. Morgan, Acting Dean of the Harvard Law School, is the author. The comment relates particularly to *Wyckoff* v. *Mutual Life Insurance Company,* 38 Oreg. Adv. Sheets 379; 147 Pac. (2nd) 227, which involved instructing the jury on the presumption against suicide. (Address: Oregon Law Review, University of Oregon, Eugene, Oregon; price for a single copy: 75 cents).

FEDERAL GOVERNMENT—*"Disposition of Surplus War Property":* A comprehensive survey of the legal problems in disposing of surplus war property is in the June issue of the *Temple University Law Quarterly* (Vol. 8—No. 3; pages 309-387), under the authorship of Lieutenant Colonel J. Harry LaBrum, now attached to the Signal Corps of the Army, previously a practicing attorney in Philadelphia. The article contains interesting information on the types of surplus material and the methods actually used or proposed by various agencies for its disposal. Necessarily there have been many developments and changes since the article was written. Reference is made to errors committed in disposing of war material after the last war. The basic authority of Congress to determine and regulate the disposal of government property is examined, and current developments of the problem are summarized, including the Baruch "Report on War and Postwar Adjustment Policies" and the creation of a Surplus War Property Administration. Colonel LaBrum's exposition is useful for its thorough cataloging of the various governmental agencies in whose hands surplus property is to be found, the numerous orders and regulations already issued by the agencies, and the bills then pending in Congress which undertake to establish a general policy to govern the disposal of war property. (Address: Temple University Law Quarterly, 35 South Ninth Street, Philadelphia, Pa.; price for a single copy: 75 cents).

INSURANCE—*Interest of Beneficiary—"Beneficiaries of Life Insurance Policies":* Uncertainties as to the nature of the beneficiary's interest under a life insurance contract are illustrated in a paper by R. D. Taylor of Montreal, originally presented before a meeting of the Quebec Committee (Montreal Wing) of the Insurance Section of the Canadian Bar Association, and published in the June and July issue of the *Canadian Bar Review* (Vol. 22—No. 6; pages 509-522). The discussion is of practical interest to American lawyers because it summarizes the development of the American law on the question, and compares that development with the Uniform Insurance Act in the common law provinces of Canada and with the need for clarification of the rights of beneficiaries under the law of Quebec. (Address: The Canadian Bar Review, Osgoode Hall Law School, Toronto 1, Ontario, Canada; price for a single copy: 75 cents).

INTERNATIONAL LAW—*"The Jus Postliminii and the Coming Peace":* In the June issue of the *Tulane Law Review* (Vol. XVIII—No. 4; pages 584-596), which places emphasis on the civil law, Professor Gordon Ireland of the School of Law of the Catholic University of America, discusses the *jus postliminii* of the Roman Law and the modern international law doctrine of *jus postliminii,* outlining the extent to which legal facts and relationships created in sovereign states during the period of enemy occupation may have effect in the new or restored juridical systems. His exposition is timely and should be of interest to both lawyer and layman. As the author indicates, various points in the modern doctrine relating to property rights may have a bearing upon the compensation clauses in the peace treaties to be made on termination of the present conflict. (Address: Tulane Law Review, New Orleans, La.; price for a single copy: $1.00).

LABOR LAW—*Symposium Series on the National War Labor Board:* The June issue of *The Rocky Mountain Law Review* (Vol. 16—Nos. 3 and 4; pages 93-161) is devoted prin-

cipally to five articles on the work of the National War Labor Board. The authors are officials or employees of the Board itself; the experience of attorneys practising before it is left unpresented—a course which is regrettably followed by many editors of such symposia. The leading article is a reprint of a speech before the Denver Bar Association by Martin Kurasch, Regional Attorney for the Ninth Regional War Labor Board. He undertakes to outline the "basic concepts of the National War Labor Board", and deals especially with the questions of union security and wage stabilization. The procedure followed by the War Labor Board in the settlement of labor disputes is reviewed by Vincent M. Dwyer, Information Director of the Ninth Regional Board. Wage stabilization questions of policy and the more technical problems of jurisdiction is covered in some detail in a survey by Harold Tascher, Labor Economist of the Wage Stabilization Division of the Ninth Regional War Labor Board. The "public interest" in wartime regulation of labor relations is examined by Professor Harl R. Douglas, Director of the College of Education and Chairman of the Department of Psychology at the University of Colorado. He writes as a public Panel Member of the Ninth Regional Board. The final article of the series outlines the purpose, scope and work of the Nonferrous Metals Commission, created by the War Labor Board to deal with the special problems of the mining industry. John E. Gorsuch, Vice Chairman of the Commission, is its author. Lawyers who wish information as to the functioning of the War Labor Board as its employees view it, particularly in the states comprising the Ninth Region, may find this series useful. The approach of the practising lawyer to the same problems is left out. (Address: Rocky Mountain Law Review, Boulder, Colorado; price for a single copy: $1.00).

MILITARY LAW—*Survey of Successive Articles of War Under the Constitution and Establishment of Rules of Evidence for Army Courts-Martial—"Hearsay in Military Law":* For the past twenty-eight years every member of the Army accused before a general or special court-martial has enjoyed the statutory right, secured by Article of War 17, to be represented in his defense at the trial by civil counsel of his own selection employed at his own expense. This right is today so much invoked by military persons brought to trial by general court-martial that a member of the Bar functioning in such a tribunal as defense counsel is commonplace of administration of military justice in first instance—a far cry from the practice of a century ago, when such counsel were allowed to be present and advise the accused, *sotto voce*, but not to address the court. Court-martial practice is therefore to be looked upon as now at least an adjunct activity of the legal profession, in which members of the Bar in all parts of the country have a real professional interest, especially at the present time when the Army of the United States numbers more than seven million men who are subject to court-martial jurisdiction as respects the substantive criminal law in general no less than the distinctive military offenses. To the June issue of the *Virginia Law Review* (Vol. 30—No. 3; pages 462-479), Colonel William M. Connor, USA-Ret., contributes an informative and authoritative article on "Hearsay in Military Law," expository of his own views and his proposal of improvement in the law on that essentially controversial subject. The author, a former Judge Advocate of the Regular Army and Professor of Law of the United States Military Academy, writes from the vantage ground of knowledge and experience gained as Staff Judge Advocate in military justice administration over a period extending from World War I to the present year. The scope and sweep of this contributed study is much larger than its above-quoted title indicates. It includes a brief but comprehensive survey of the several Military Codes framed under the Constitution in their respective bearing upon the rules of evidence administered by Army courts-martial. With this survey begins a painstaking and elaborate study of the nature and formation of our courts-martial rules of evidence which much enhances the value of the entire article as a lucid discussion of the military law of evidence in the light of the procedural technique requisite to and characteristic of the administration of military justice and discipline under the Articles of War enacted by Congress from time to time since the beginning of the last century. The crux of the focal question dealt with in the study in constructively critical fashion is the needless harm done to the administration of military justice and discipline by the too rigid rule against hearsay prescribed in the chapter on Evidence in the current "Manual for Courts-Martial, U. S. Army," as construed and applied in recently published pronouncements of the statutory Board of Review in general court-martial cases. By fair analysis and comparison with the prevailing Federal Court rule on hearsay, the author makes clear the fact of law that the Manual rule does lag far behind the liberal Federal rule laid down by the Supreme Court. His unique proposal of improvement of the Manual rule against hearsay takes the form of a radical change therein, which, although without parallel in American criminal procedure built around trial by jury, may be deemed to be well in accord with the quoted classic precept of the learned Mr. Attorney General Cushing respecting trials by court-martial, the truth of which this article declares to be the life principle of our whole court-martial system. (Address: Virginia Law Review, Charlottesville, Virginia; price per single copy: $1.25).

MILITARY LAW—*"Due Process and the Selective Service":* A timely article under the title "'Due Process' and the Selective Service" is in the June issue of the *Virginia Law Review* (Vol. 30—No. 3; pages 435-462).

A growing volume of litigation has attended the operations of the Selective Service System since its inception in September of 1940. The author, a Major in the Judge Advocate's Division of the United States Army and Legal Adviser to the Louisiana Selective Service System, has examined this litigation, and has made a critical analysis of the decisions. Of special interest are two recent cases which are discussed at length, *Falbo* v. *United States*, 320 U.S. 549 (1944) and *Billings* v. *Truesdell*, 321 U.S. 725 (1944), in which the Supreme Court passed on current phases of the problem. The article begins with a description of the Selective Training and Service Act of 1940. A comprehensive exposition is then made of the manner in which the Congress has endeavored to provide as many of the conditions usually associated with "due process of law" as were believed to be consistent with the primary mission of an agency such as the Selective Service System. (Address: Virginia Law Review, Charlottesville, Va.; price for a single copy: $1.25).

PATENTS—*Trade-Marks—Unfair Competition*—*"Monopoly versus Competition: Subsequent Trends in Patent, Anti-Trust, Trade-Mark, and Unfair Competition Suits"*: An excellent article analyzing the decisional trends in patent, anti-trust, trademark and unfair competition suits in the federal courts during the past decade, may be found in the June issue of the *Yale Law Journal* (Vol. 53—No. 3; pages 514-552). The author, Sergei S. Zlinkoff, of the New York Bar, with an exhaustive review of the decided cases which is aided by elaborate footnoting, points out that there has been a marked tendency in each of these branches of the law to regard the "public interest" as the dominant interest, and also an insistence on the part of the federal courts that this interest is best served by the freest possible competitive economy. (Address: The Yale Law Journal 127 Wall Street, New Haven, Conn.: price for a single copy: $1.25).

TAXATION—*"Taxation of Community Property: The Wiener case"*: The June issue of the *Tulane Law Review* (Vol. XVIII—No. 4; pages 525-553), contains an interesting contribution under the above title, by Ralph Newman Jackson. Tracing the history of the community property concept with particular reference to Louisiana's community property system, the author discusses the refusal of the Supreme Court to pass upon the constitutionality of Section 402 (b) (2) of the Federal Revenue Act of 1942, in *Flournoy* v. *Wiener* (321 U.S. 253), and also the problems presented by this litigation. By way of conclusion, he suggests that the entire framework of federal inheritance, gift and income taxation should be revised "with a view toward replacing the present irrational structure with an integrated system which would import a clearer understanding of the interests involved in the community system." (Address: Tulane Law Review, New Orleans, La.; price for a single copy: $1.00).

TAXATION—*"'Relief' Provisions in the Revenue Act of 1943"*: In the June issue of *The Yale Law Journal* (Vol. 53—No. 3; pages 459-494), James E. Fahey, of the Kentucky Bar, treated objectively and in a helpful fashion the five controversial "relief" provisions in the Revenue Act of 1943; viz., the provision for nonrecognition of gain or loss on corporate reorganizations carried on under Court supervision and the concomitant "basis" provision, the extension of percentage depletion to numerals formerly denied its use, the provision enabling taxpayers in the timber or logging business to treat the cutting of their timber as a sale of a capital asset, the extention of excess profits tax exemption to natural gas companies, and the broadening of the existing exemption of air mail carriers from excess profits taxes. After discussing each of these provisions in the light of the situations they were designed to change, the author concludes that, except for "those provisions which were designed to achieve increased war production," the 1943 Revenue Act as a whole "achieves a well-considered balance between the weight of a desire to do substantial equity to taxpayers and pressure from the public treasury for an increased income over that provided by the existing revenue system." (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.25).

WORKMEN'S COMPENSATION—*"The Employee-Employer Relationship under Workmen's Compensation Acts"*—*"Federal Supremacy in Five Workmen's Compensation Problems"*: Samuel B. Horovitz, of the Boston Bar, and for many years workmen's compensation attorney for the Boston Legal Aid Society and the Massachusetts State Federation of Labor, has contributed two articles in the above indicated field, which are worthy of examination by lawyers concerned. One article was in the May issue of *The Law Society Journal* (Vol. 11—No. 2; pages 143-175), under the heading "The Employee-Employer Relationship under Workmen's Compensation Acts." It gave a comprehensive survey of the numerous exceptions to workmen's compensation coverage which are recognized by various state statutes and court decisions. The other article, in the June, 1944 issue of the *Boston University Law Review* (Vol. 24—No. 3; pages 109-143), dealt with five phases of the law where federal supremacy has been established, viz.; constitutionality, admiralty, extra-territoriality, interstate commerce, and federal territory. Each article was extensively footnoted and contained a wealth of case material on the subjects discussed. (Address for the first article: The Law Society of Massachusetts, 18 Tremont Street, Boston, Mass.; price for a single copy: 50 cents. Address for the second article: The Boston University School of Law, 11 Ashburton Place, Boston, Mass.; price for a single copy: 70 cents).

Board of Governors' Meeting

Consideration of the reports of Sections and Committees for transmittal to the House of Delegates occupied much of the time and attention of the Board of Governors during its first three sessions on September 8, 9 and 12. Action thereon is reported in the proceedings of the House.

Discussion of the annual Ross Essay Contest resulted in the selection of the following subject for 1945—"The Development of the Doctrine of *Stare Decisis* and the Extent to Which it Should Be Applied".

The amount of the award was fixed at $3,000.00.

The Editor-in-Chief of the American Bar Association JOURNAL reported the existence of two vacancies on its Board of Editors by reason of the expiration of the term of Reginald Heber Smith of Boston, and the election of Tappan Gregory of Chicago as Chairman of the House of Delegates, resulting in his becoming a member of the Board of Editors in that capacity. Mr. Smith was thereupon re-elected for a five year term and Edward J. Dimock of Albany, New York, was elected to serve the unexpired term of Mr. Gregory.

A special committee authorized by the Board at its June, 1943, meeting to make a survey respecting the rights of the mentally ill with a view to determining whether there is a problem in this field with which the American Bar Association should concern itself presented the following recommendations which were approved by the Board:

"(1) That the American Bar Association create a Committee to advise the Association whether existing laws adequately safeguard the rights of the mentally ill and, if the Committee finds that they do not, then to submit drafts of such legislation as in the opinion of the Committee is necessary to safeguard such rights.

"(2) That such drafts of legislation, if any, as the Committee may submit and as the Association approves be, with or without amendment, referred to the National Conference of Commissioners on Uniform State Laws for such action as it deems proper.

"(3) That the Committee, with the approval of the Board of Governors, be authorized to procure the cooperation of such organizations as it believes can aid it in its work."

The President was authorized to appoint the Committee called for by the recommendations.

The Board, as constituted with the newly elected members and officers, convened on September 15 following adjournment of the annual meeting, with President David A. Simmons in the chair. The first item of business was the selection of the Board of Elections. The present members, Judge Edward T. Fairchild of the Supreme Court of Wisconsin, Chairman, William P. MacCracken, Washington, D. C., and Laurent K. Varnum, Grand Rapids, Michigan, were re-appointed.

Acting upon the report of the Budget Committee, the Board approved a budget for the current year. The budget, as submitted and adopted, estimates receipts and expenditures substantially in excess of those contained in the budget for the past fiscal year, but in line with actual experience for that period.

A request from the Council of the Section of Legal Education and Admissions to the Bar that it be given permission to cooperate with the Practicing Law Institute in putting on refresher courses for returning lawyer veterans and law graduates was granted by the Board.

Representatives of the Section of Bar Activities appeared before the Board and urged reconsideration of the action taken at its May, 1944, meeting refusing approval of a proposal by the Section's Committee to Promote Public Interest in Government to put on a thirteen week half-hour national radio broadcast to be financed by a private corporation. Officers of the Section advised the Board that the matter had been thoroughly discussed at the Section's annual meeting and that those in attendance had given it unanimous approval. It was further stated that the radio time and all expenses in connection with the program would be furnished directly by the Chesapeake & Ohio Railroad Company but the the selection of the subjects, which are to cover important public questions, and the speakers to present both sides of such questions, would be in the complete control of the Association. Credit would be given to the sponsor merely for making the radio facilities available to the Association in the public interest. Replying to the request contained in the previous resolution adopted by the Board, the Committee reported that it had endeavored to secure a sustaining program but was unsuccessful. After extended discussion, the Board, in reconsidering its former action, approved in principle the recommendation of the Section and authorized it to proceed with the program along the lines in-

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Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, Gustave Simons, Howard O. Colgan and Martin Roeder, New York City, and Allen Gartner, Washington, D. C.

Trusts with discretionary provisions for the use of income for the support, education and maintenance of the grantor's minor children continue to come before the courts for tax scrutiny in a variety of situations. Under Section 134 of the Revenue Act of 1943, which retroactively overruled the *Stuart* case, such income is taxable to the grantor only to the extent that it is applied to the maintenance or support of a legal dependent of the grantor, provided the discretionary power is exercisable by a person other than the grantor, by a trustee, or by the grantor acting as trustee or co-trustee. In *Hopkins* v. *Com'r* (C.C.A. 6, Aug. 21, 1944), the grantor retained the power to require income or corpus to be used for the best interests of his children, but during the taxable year paid all of the expenses of the dependents out of his own funds. The court upheld the tax even though the grantor was a co-trustee, since his right to require the use of the income for his dependents' support was not in his capacity as trustee. However, the grantor's taxable income from the trust was limited to the amount actually spent out of his own funds for the support of his children. In *J. O. Whiteley*, 3 T.C. No. 161, the income of trusts created by a husband was to be paid to his wife and was to be used by her for the support of their minor children. Any income not so used was to be accumulated by the wife as trustee. Since none of the income was used by the wife for the support of the children, no part of the income could be taxed to the grantor.

Problems have arisen also under the estate tax law. In *Com'r* v. *Douglass Estate* (July 10, 1944), the Third Circuit held that an estate tax may not result from the possible use of trust income for the support of minor dependents, at least where such use was in the discretion of trustees other than the grantor. Although the court was not influenced by the fact that the trustees' interests were nonadverse to the grantor, it indicated that a contrary result would follow where the discretion was solely in the grantor. Cf. *Helfrich Estate* v. *Com'r*, 143 Fed. (2d) 43. Nor may an estate tax be predicated upon the use of trust income for the support of the grantor's adult dependents, where such income is paid to them without any restriction. *Wishard.* v. *U.S.* (C.C.A. 7, July 10, 1944).

U.S.—Canada Tax Convention

The Tax Convention between the United States and Canada for the purpose of avoiding double estate taxes and succession duties and preventing evasion of these taxes has been ratified by Canada but has not yet been ratified by the United States Senate. By its terms, the treaty is effective as of June 14, 1941. It is understood that the Canadian tax authorities are presently giving effect to the provisions of the Convention but a similar policy is not being followed in the United States.

Under the terms of the Convention real property will be taxed exclusively by the country wherein it is situated; shares of stock in a corporation will be deemed to be situated in the country in which the corporation is organized: except as otherwise provided, the situs of property is to be determined by the law of the country imposing the tax and allowances for debts are likewise to be so determined; each country in computing the gross estate of its citizens or domiciliaries in the first instance has the right to include any property (except real property) situated in the other country; each state is to take into account only property situated within its boundaries in taxing estates of domiciliaries of the other country; taxes paid in the country of situs are to be allowed as a credit against taxes payable in the country of domicile which includes the same property for tax purposes; the amount of the credit, however, is to be limited by the ratio of the value of the property abroad which is also taxed in the country of domicile to the total value of property taxed abroad, and is not to exceed the proportion which the value of the property abroad bears to the value of the entire gross estate; information is to be exchanged between the two authorities to prevent fiscal evasion.

Employees' Trusts Information Service

The pension Trust Division of the Bureau's Income Tax Unit has inaugurated a "Pension Trust Division Information Service". Releases (designated PS No.) are available to the public. Of general interest among the releases thus far issued are the following:

There is no "discrimination" where a trust which provides insurance benefits gives to uninsurable participants an additional annuity with the portion of the contribution which would otherwise have been used to purchase their insurance. PS No. 3 (July 29, 1944).

Social Security benefits may not be taken into account where the employer's business is not recognized for covered employment. But, the full 150% of primary benefits may be taken into account even where some

employees will not qualify for that amount, or even where some may not qualify at all because of length of service requirements. PS No. 5 (July 29, 1944). Where employees have Social Security coverage, it may be assumed that all employees were covered from the date of the plan or from January 1, 1937. Present base earnings may be assumed from January 1, 1937, until retirement date. PS No. 13 (Aug. 24, 1944).

A trust may provide that only a portion of the insurance benefits payable with respect to any employee are to be paid out to his beneficiaries, and that the balance is to be held by the trust to cover the possible inability of the employer to make future contributions. In such a case, however, only the cost attributable to the benefits payable to the employees' beneficiaries is deductible as an expense. PS No. 6 (July 29, 1944).

If a trust is inaugurated merely to take advantage of high tax rates, and is abandoned within a few years when it becomes less advantageous, the existence of a "plan" will not be recognized. On the other hand, actual financial inability to continue the plan will not jeopardize the earlier deductions. Notice of abandonment, with an explanation of the circumstances, should be sent to the Commissioner. PS No. 7 (July 29, 1944).

The 30% limitation upon contributions for stockholders, suggested by I.T. 3674, I.R.B. 1944-13-11781, does not mean that a lower percentage will necessarily be approved. PS No. 10 (Aug. 10, 1944). For this purpose, only those stockholders are considered who own 10% or more of the stock, but this percentage takes into account stock owned by a spouse or minor child. In addition, it takes into account constructive ownership of stock, such as ownership through another corporation, or through a partnership, estate, trust or nominee. PS No. 20 (Aug. 29, 1944).

Employees must be given the right to designate their own beneficiaries. This right may not be curtailed or restricted by permitting the trustee or pension committee to designate the beneficiaries after consultation with the employees. The plan may provide, however, that in the absence of designation by an employee, his beneficiary will be designated in a certain order of priority, such as his wife, children, parents, brothers and sisters, or his estate, but such a designation must be subject to change by the employee at any time. PS No. 19 (Aug. 29, 1944).

A profit-sharing plan must set forth a definite formula for contributions. A formula is not definite if the employer reserves the right to contribute any amount it sees fit between a fixed percentage of annual profits and the maximum amount permitted as a deduction. PS No. 16 (Aug. 24, 1944). Nor can a formula provide for the determination of profits after certain specified reserves, unless these reserves can be computed mathematically. A reserve for dividends voted by the company and a reserve for contingencies in an amount determined by the company are indefinite and discretionary, and therefore unsatisfactory. PS No. 21 (Aug. 29, 1944).

A partnership is not prohibited from installing a pension plan for the exclusive benefit of its bona fide employees or their beneficiaries. A general partner, however, is not an employee of the partnership. PS No. 23 (Sept. 2, 1944).

Gift Tax—Antenuptial Gift

In *William H. Wemyss*, 2 T.C. 876, previously reported in Tax Notes, the Tax Court held that a transfer of property made by the taxpayer pursuant to an antenuptial agreement to compensate his prospective wife for the loss, by reason of remarriage, of income from trusts created by her former husband was not made for an adequate and full consideration and should be taxed as a gift. This decision has been reversed by the Sixth Circuit (July 24, 1944). That court holds that the transfer did not constitute a taxable gift, since it was made as a businesslike transaction in which the intended wife received a valuable consideration in exchange for the detriment suffered by her. Moreover, since any donative intent was negatived by a substantial "detriment" in money's worth, even the excess value of the transferred property was not a taxable gift.

Gift Tax
Future Interest

In *U.S.* v. *Pelzer*, 312 U.S. 399, the Supreme Court held that a trust gift was that of a future interest (and therefore not entitled to an exclusion) where the income was to be accumulated for a minor beneficiary who would lose his right to the accumulation upon his death before reaching majority. Despite the court's emphasis in that case and in *Ryerson* v. *U.S.*, 312 U.S. 405, upon the contingent nature of the beneficiary's interest, this rule was extended in *Welch* v. *Paine*, 120 Fed. (2d) 141, to a trust in which the accumulation was vested in the minor beneficiary, and would therefore be payable to his estate upon his death during minority. This decision of the First Circuit was accepted by several courts, including the Third Circuit in *Com'r* v. *Taylor*, 122 Fed. (2d) 714, cert. den. 312 U.S. 699. Then, in *Disston* v. *Com'r* (July 12, 1944), the Third Circuit in a 2-1 decision rejected this extension of the *Pelzer* rule. The mere requirement of accumulation, the court held, did not convert a present vested interest into a future interest.

The Tax Court has held, relying upon *Welch* v. *Paine*, that a vested remainder is not entitled to an exclusion. *Rosa A. Howze*, 2 T.C. 1254. In *Vivian B. Allen*, 3 T.C. No. 157, where accumulated income was to pass to the remainderman, the Tax Court indicated an unwillingness to follow the *Disston* case, even where the accumulated income was payable to the infant if she attained majority or to her children if she died before then.

Junior Bar Notes

by T. Julian Skinner, Jr., SECRETARY, JUNIOR BAR CONFERENCE

At the eleventh annual meeting of the Junior Bar Conference of the American Bar Association, held on September 10-12, in Chicago, Illinois, as a part of the annual convention of the American Bar Association, Charles S. Rhyne of Washington, D. C., was elected as the new chairman. Ray Nyemaster, Jr., Des Moines, Iowa, and T. Julian Skinner, Jr., Birmingham, Alabama, were named Vice-Chairman and Secretary, respectively.

Six Council Vacancies Filled

Although the terms of some of the members of the Executive Council of the Junior Bar Conference did not expire with the September meeting, such was not the case with respect to all and accordingly six new members were elevated to the Council. That group, consisting of one representative from each Federal Judicial Circuit, is composed of the following:

First Circuit
Charles W. Tobey, Jr., Concord, N. H.

Second Circuit
Lyman M. Tondel, Jr., New York City

Third Circuit
Leon Dreskin, Newark, N. J.

Fourth Circuit
C. Keating Bowie, Jr., Baltimore, Md.

Fifth Circuit
Robert W. Gwin, Birmingham, Ala.

Sixth Circuit
Arthur M. Sebastian, Columbus, Ohio

Seventh Circuit
Julius Birge, Indianapolis, Ind.

Eighth Circuit
John S. Howland, Des Moines, Iowa

Ninth Circuit
William R. Eddleman, Garfield, Washington

Tenth Circuit
Charles A. Kothe, Tulsa, Oklahoma

Dist. of Columbia
J. Edward Bindeman, Washington, D. C.

It has become the custom for delegates from various Junior Bar groups affiliated with the Junior Bar Conference to hold a meeting as a part of the Conference's schedule of events. This meeting was held on the morning of September 10, the day that the Conference opened its annual meeting, and was as well attended as could be expected during this war period. The delegates discussed means of more effectively conducting bar activities.

At noon of the same day the members of the Conference and their guests enjoyed a luncheon at which Stephen E. Hurley, President of the Chicago Bar Association gave an interesting talk.

The first general session of the Conference was held on the afternoon of that day with Joseph D. Calhoun of Media, Pennsylvania, a former Chairman of the Conference, presiding. John M. O'Connor, Jr., chairman of the Younger Members Committee of the Chicago Bar Association, welcomed the group and A. Pratt Kesler, President of the Salt Lake City Bar Association, Utah, responded. Joseph W. Henderson, President of the American Bar Association, briefly spoke on bar activities as did David A. Simmons, President of the American Judicature Society. James P. Economos of Chicago, Chairman of the Conference, then presented the annual report of the Chairman. The Secretary's annual report was presented by Hubert Day Henry, Denver, Colorado.

Committee Reports Acted Upon

Reports and recommendations of various committees were then received and acted upon. The report of the Committee In Aid of the Small Litigant was made by T. Julian Skinner, Jr., in the absence of the committee chairman, Charles B. Stephens, Springfield, Illinois. The report was concerned with general legal aid, the justice of the peace survey, and small loan surveys. Hubert Day Henry reported for the Committee In Cooperation with Junior Bar Groups, pointing out progress in that field. William R. Eddleman presented the report of the Committee on Cooperation with Inter-American Bar Association, Fred Much, Houston, Texas, the committee chairman, not being present. Developments at that Association's recent meeting in Mexico City were covered.

Conference Membership Shows Increase

Charles Kothe, chairman, reported for the Committee on Membership, showing that the Conference's membership was increasing somewhat despite loss of personnel to the armed forces. The report of the Committee on Procedural Reform Studies was presented by John S. Howland, director in charge, and showed that most of the studies begun to date have been completed. Robert W. Gwin, chairman, reported for the Committee on Relations with Law Students, and Julius Birge, chairman, offered a report for the Committee on Restatement of the Law. The report of the Committee on Traffic Courts was presented by the committee chairman, Robert D. Morrison, Lynchburg, Virginia. The various traffic court conferences being sponsored throughout the country and related matters were covered by his report. Recommendations of the Executive Council which had met on the preceding day were presented and acted upon.

The Conference held its final

sessions on the following Tuesday, no sessions being held on Monday, in order that the members might attend the first session of the Assembly of the American Bar Association and other meetings on that day. At the Tuesday morning session of the Conference Mearns Gates, President of the United States Junior Chamber of Commerce, delivered an address on community service by young men, and Hon. James W. Hodson, Judge of the Municipal Court of Seattle, Washington, spoke on the improvement of traffic courts. The Committee on War Readjustment reported, through Miss Daphne Robert, Atlanta, Georgia, chairman, and Lyman M. Tondel, Jr. means of aiding lawyers returning from the service were fully discussed.

Proposed changes in the By-Laws were considered and passed upon at this session and activities generally of the Conference were discussed. Following a report of the Committee on the 1944-45 Program, the new officers and council members were elected.

State Groups Win Awards

During the same session the Committee on Awards, through Charles A. Kothe, in the absence of Glenn R. Winters, Ann Arbor, Michigan, chairman, reported the State Junior Bar of Texas as being the state junior bar group winning the certificate of award for excellence in general bar activities and the Junior Association of the Milwaukee Bar as the local junior bar group winning the same award. The Junior Bar Section of the State Bar of Michigan and the Younger Members Committee of the Chicago Bar Association were declared the state and local winners, respectively, of the awards for excellence in war work. The Junior Bar Section of the Utah State Bar won the award for excellence in activities directed toward improving traffic courts.

The afternoon session consisted of a joint session with the Section on Judicial Administration. Uniform legislation, district and state traffic court conference plans were discussed.

Various social events were enjoyed by the members of the Conference. In addition to luncheons, a cocktail party occurred on the evening following the first session and a dinner-dance on the last evening of the Conference's meeting. These enjoyable social affairs were directed by Samuel Witwer, chairman of the Committee on Local Arrangements of the Younger Members Committee of the Chicago Bar Association and by Donald V. Dobbins, Chairman of the similar committee of the Illinois State Bar Association.

INTERNATIONAL LAW

Continued from page 563

they had no legal duty to remain in that position. From time to time, the Great Powers of Europe concerted their influence to restrain the lesser States, but no agency existed by which the Community of States could assert and protect the general interest.

Tentatives of a community approach to the problem may be traced in the work of the Congress of Paris of 1856, and in that of the Hague Peace Conferences of 1899 and 1907. In 1928, a general treaty was concluded by which sixty-three States renounced war as an instrument of national policy. That treaty served the useful purpose of reenforcing a popular condemnation of States' military ventures, but its legal effect was largely vitiated by a contemporaneous declaration that each State remained the sole judge of the occasion on which it would assume to exercise a right of self-defense. As all the peoples engaged in modern wars succeed in persuading themselves that they are acting in self-defense, the renunciation had the character of a promise withdrawn in the very breath by which it was made.

More substantial progress was made in 1919 in the Covenant of the League of Nations. For in addition to its creation of agencies invested with general power to protect the common interest in peace, the Covenant enunciated a revolutionary principle of community life. It declared in effect that a war anywhere is a matter of concern to peoples everywhere. Not only was that principle accepted by the sixty-three States which joined the League of Nations. It has been for years a corner-stone of the policy of the United States which did not join the League.

With the new dangers which have come to the world from the globalization and the mechanization of war, we seem compelled to continue this effort to bring military power within the reach of international law. If we seek an advance, I suggest that we must deal not with *war*—a term which defies successful definition—but with the *use of force* more generally. We can proceed on the principle that any use of force or any threat to use force by a State in its relations with another State is a matter of concern to the whole Community of States. We can at the same time confer on agencies of the organized Community of States power to intervene to protect the general interest when any menace arises. I think it would be a mistake for us to attempt any rigid restriction of the extent of that power, or any very definite prevision of the nature of a useful intervention. We cannot ordain the precise circumstances in which force must be employed on behalf of the Community of States, nor can we prescribe that it may never be employed in that behalf. What we can aim to do with some hope of success is to endow agencies of the whole community with competence to be exercised according to the wisdom of the time, and to build a law, applicable to the great as well as to the lesser great States, which will proscribe the use of force by any State acting merely in its own interest and without a legal mandate from the organized Community of States. I am under no illusions as to the magnitude of these tasks, and I confine myself to describing a goal without dealing with the obstacles which we may encounter if we seek to approach it.

2. Any effort directed toward the proscription of force may be doomed to failure if it is not accompanied by an improvement of pacific means for dealing with disputes between States. Since the dawn of this century, astonishing progress has been achieved in the pursuit of this objective. Most of the States of the world have shown themselves disposed to assume obligations with respect to the adjudication of certain types of disputes, and in the later years hundreds of the treaties which create such obligations have been emancipated from the strangling exceptions of an earlier period. Yet some of the current treaties—particularly those to which the United States is a party—give but halting recognition to obligatory adjudication, and one of the immediate tasks of the post-war period should be the re-examination and the modernization of the whole structure of agreements relating to pacific settlement.

A new landmark was supplied to international law in 1920 when a generation of effort came to fruition in agreement upon the Statute of the Permanent Court of International Justice. More than fifty States formally ratified that agreement, and practically all the States of the world—including all of the twenty-two States of the Americas—conferred on the Court some measure of jurisdiction. From 1922 to 1940, the Court functioned at The Hague. Its record in dealing with some sixty disputes between States is an open book which any may read who will, and I do not need to appraise it now.

So general is the satisfaction with the Court's organization and procedure and functioning that it now seems to be agreed on all sides that this great institution must be continued in the post-war era, with merely those modifications which may be necessary to adapt its Statute to changed conditions. Agreement seems to be quite general, also, that the Court must have an integral place in any general international organization. It would be a great step forward if by an extension of the general law all States should confer on the Court compulsory jurisdiction over defined categories of legal disputes. Many States seem to be prepared to move in that direction; yet the records of some States—among them some of the more powerful States—give little assurance that this step will be taken. If we must continue to leave to each State a complete option as to the terms on which it will subject its disputes to the Court's jurisdiction, ways may still be open by which we can approach the goal of a general compulsory jurisdiction over legal disputes.

Some current proposals seem to indicate that it is insufficiently appreciated that there are severe limitations on the usefulness of a strictly judicial tribunal in connection with disputes between States. For disputes

which can be resolved by the interpretation and application of existing law and treaties, the record of the Permanent Court of International Justice has shown that it is admirably equipped. All disputes are not of that character, however. In some cases, they present frontal challenges to the prevailing law and treaties, and if progress is to be made in dealing with them the task may have to be entrusted to men who do not operate within the confines of the judicial process, whose business it is to appraise and to canalize currents of opinion, and who by their authority at the moment are invested with a freedom to strike out along paths not blazed by the law and treaties in force.

I am not suggesting that any hard and fast distinction can be drawn between legal and political disputes. I am suggesting that effective pacific settlement will require a differentiation of functions. Within a limited field, judges on the bench can make a most useful contribution. Outside that field, the responsibility must rest on politicians, and they should be placed in a position to discharge it. If results are desired rather than the pursuit of logical distinctions, we shall not imperil judicial agencies by burdening them with political functions, but in addition to provision for their action within the limits of judicial process we shall stress a rôle for political authorities in the exercise of their high calling.

3. This conclusion gives emphasis to the importance of the process by which problems can be removed from the political plane into the field of law. To keep pace with the expansion of international relations in consequence of improvements in transportation and communication, it has long been appreciated that reliance on the customary development of international law is not enough, and that methods are needed by which it may be consciously extended. For this purpose, a process has been invented which can properly be called international legislation.

Beginning in the middle of the last century, large numbers of States have frequently come together in time of peace to chart a common course for dealing with common problems. The result has been a great series of multipartite international agreements which now cover many phases of our every-day life. Let me illustrate the change which has come about by referring to a declaration made by a Secretary of State of the United States barely seventy-five years ago that it was the firm policy of our Government to refrain from entering into agreements to which many other States were parties; yet in the course of recent years the United States has become a party to scores of such agreements.

Today, international law derives its content in large measure from multipartite treaties and conventions. Without creating a continuing body of general legislative competence, the world has discovered methods by which law can be extended and adapted to meet many of the needs which have arisen out of new world conditions.

With the restoration of peace, fresh opportunity will come to us to continue this legislative process. Some of the existing agreements will have to be revised, and new agreements will be needed in fields not yet explored. This is already being appreciated by the United Nations, and in the recent conferences at Hot Springs, at Bretton Woods, and elsewhere, promising preparation has been made for inaugurating a new era of international legislative activity. The result may be, it can be, an extension of international law which will assure a more effective ordering of normal international relations than we have ever known in the past.

I have attempted to enumerate only a few of the directions along which we may seek to build the International Law of the Future. We shall not on any beautiful morning awake to discover that the task has been completed overnight. No nostrum will be invented to assure the fulfilment of our desire for "a just and enduring world peace securing *order under law* to all nations." Patience will be required as well as courage. Continued and persistent effort will need to be backed by determined will. We cannot hope for much progress unless we are ready to make some departures, to subordinate some preoccupations, and to cultivate some new loyalties. And perhaps one generation can but lay the foundations upon which a later generation may build.

Yet I am bold enough to suggest that the renovation of international law is not a hopeless task. When such a flag is flying, lawyers will not be content to sit aside with folded hands. We may not have the last word, but we must have some word. With the establishment of a general international organization which gives some promise of security and which enables all States to share in cooperative effort, I think we can look forward to a development of international law which will make it a powerful instrument for achieving peace and prosperity.

The Ross Essay Committee in 1944: ***In connection with the publication of the winning essay for the Erskine M. Ross Memorial Prize in our September issue (pages 489-496; 513-514), the Journal failed to mention that the 1944 Committee on Award, which performed the laborious task of examining carefully the many essays and made the selection which was approved by the Board of Governors, was made up of Chief Justice George W. Maxey, of the Supreme Court of Pennsylvania; Robert B. Tunstall, of the Norfolk, Virginia, Bar; and Professor Edwin M. Borchard, of the Yale Law School.***

The Association is always grateful to the distinguished members of the profession who, from year to year, are willing to give their leisure and their best thought to the considerable work of reading the essays and recommending a recipient of the prize.

FRANK J. HOGAN

Continued from page 575

ment within the bounds of constitutional limitations, if that were to be done at all. In his Annual Address[1] he clearly and boldy so declared.

His Views Were Never at the Command of Clients

Some people assumed that, because of his conspicuous clients, his own views and philosophies were reactionary or retrogressive. It was not so at all. His views were always his own; no client ever could retain his views. He had a liberal and forward-looking philosophy of politics and government.

With innate modesty he minimized the achievements of his noteworthy year, but he liked to speak of the friends he had made and of the companionship he had enjoyed. He was proud that the lawyers of the nation had come to know him and had taken him to their hearts, as had the members of his local Bar.

This was one of the things that to him mattered most. He was always a good companion. Many of us can visualize him now, entertaining his fellows in his home, beaming as he listens to them sing the jocular and bantering songs they had composed about him.

His friendships were not limited to those of his own profession. He inspired affection in all with whom he came in contact. He was entirely unspoiled by success, by the abundant material rewards and outstanding professional reputation that were his. He numbered among his intimates not only many of the nation's great, but multitudes in all walks of life, for he never lost the common touch. To them all he was "Frank." It would have seemed affectation to call him anything else.

Like the American Bar Association which he loved and served, Frank's life and work were representative of his country. Born in Brooklyn, spending his boyhood in the South, practicing law and rising to recognition in the Bar of the District of Columbia, he was equally at home in any part of his country, and in later life spent a great deal of his time on the Pacific Coast.

He envisioned America as a whole and respected the traditions of all sections. He fought and worked for a united America, and the last years of his life were activated by a mighty passion for all-out support of his country in the great war. He swept aside all lesser issues. He could brook no lethargy or indifference as to the prosecution of the war or as to backing up the men who were bearing the brunt and burdens of mortal combat.

Our hearts go out to those of his family and immediate circle who will know him no more. We share their sense of loss. With them we know that his memory will abide: a friend charming, generous and dependable; a counselor realistic and wise; an advocate ardent and brilliant; a citizen devoted and unafraid; of his beloved profession an ornament and a benefactor.

Sir, I move the adoption of this resolution.

1. 64 ABA Rep. 478-500.

BOARD OF GOVERNORS

Continued from page 585

dicated in its report subject, however, to supervision by the Special Committee on Public Relations to be appointed by the President. In view of the sharp division in the Board upon the action taken, it should be stated that those who disagreed with the majority approved the idea of a radio program to promote public interest in Government but disapproved private sponsorship.

The Board authorized the President to appoint a special committee of nine members on Postwar Planning.

Action was deferred on the fixing of the time and place of the meeting of the State Delegates and a mid-year meeting of the House of Delegates. President Simmons announced that the annual Conference of Section Chairmen of the Association will be held in Chicago at the Drake Hotel, November 18 and 19, 1944.

NOT FOR TODAY ALONE

Continued from page 557

believe in these things, it is not going to be very hard to find the way.

Whether or not the League of Nations was the best plan I will not say, but I will say this, that it was wrecked before it was tried. There were great difficulties. It was said that Britain and France wanted a Security Pact for themselves. It was said that Woodrow Wilson went along working for this great solution of the problem of peace, but that he went alone; that he did not take the House of Representatives with him; that he did not take the Senate with him; that when he tried, it was too late.

Well, of course, leaders must ever learn that they are there to interpret the will of the people, and even if they give leadership and body to what is to be done, they can only carry it out when they have the people with them, and Woodrow Wilson did not have that mandate, but that warning of yesterday is not being disregarded today.

Oh, you ask me tonight why I have hope. Today the people of the United States, through the House of Representatives and through the Senate, have already given expression to the will of the people favoring the creation of international machinery to establish a just and lasting peace.

The House of Representatives passed the Fulbright Resolution by a vote of 360 to 29. Do you mind if I read that resolution?

> Resolved, By the House of Representatives that Congress hereby expresses itself as favoring the creation of appropriate international machinery with power adequate to establish and to maintain a just and lasting peace amongst the nations of the world and as favoring participation by the United States therein through its constitutional processes.

Three hundred and sixty to twenty-nine! That is not a party vote. This body, so close to the people, has spoken for the people; then in October last you had the Senate resolve:

> That the United States, acting through its constitutional processes, join with the free and sovereign nations in the establishment and maintenance of international authority with power to prevent aggression and to preserve the peace of the world.

There you have American opinion. There you have a verdict given in numbers that truly represent your two great parties in the United States.

I know that neither of those resolutions is binding. I know that when peace comes those in power will have to decide, but I hope I see a moral mandate that can be found in the tremendous strength and power behind those two resolutions.

The declarations of President Roosevelt and Mr. Dewey make it clear indeed that they reflect their beliefs.

And now I pass on a little further and I go to the Moscow Conference – Moscow, November, 1943 – the Joint Four Nations Declaration, which includes China, that they:

> Recognize the establishment at the earliest practical date of a general international organization based on the sovereign equality of all peace-loving states and open to membership by all such states, large and small, for the maintenance of international peace and security.

And may we hope and pray that dear France will soon grow strong and take her part in the determination to make this a lasting peace.

I have reviewed maybe at length the clear-cut declarations of those who lead the thoughts and interpret the minds of your people. I have not only pointed out what your great country with its fine people and its great resources and its tremendous power is thinking. I have pointed out what your leaders are saying.

That Moscow Conference says that Great Britain, the United States, Russia and China are all thinking of cooperation in the establishment and maintenance of a just and lasting peace; and Mr. Hull said this, and I like reading this, about the Moscow Conference:

> There will no longer be need for spheres of influence, for alliances, for balance of power, through which in the unhappy past the nations strove to safeguard their security or promote their interests.

Why, it almost looks as if those teachings of two thousand years ago by the Old Master were coming closer and closer to nations, that nations were beginning to realize, like individuals, that they too, are their brother's keeper.

There is the picture and there is the reason why I say there is hope that those who die in this war will die for a victory as great as any victory that ever challenged brave men. It is not accomplished yet.

You are a nation without which no combination can exist strong enough to set up and maintain international machinery that will guarantee peace any more than could be guaranteed without the United Kingdom and without Russia.

Members of the American Bar, the voice of a city or a town or a village—that comes from the individual, and then from the voice of these individuals comes the voice of the town, you get the voice of the state, and from the voice of the state finally you get the voice of the nation, or, as we say, we get the voice of the province and then the voice of the dominions, and when you get the voice of the dominions, then you get the great voice of the Empire.

This thing is just a question of people believing in it, and a question of people working for it, and there must be something more; there must be something far more than just a desire for lasting peace. There must be unity and there must be determination to maintain that machinery that is necessary, and when victory comes—when victory comes—the bells will ring.

I thought about that yesterday. My wife and I took a bus ride and as we passed down this beautiful avenue you have here, and as the bus went on, we went further and we went further. We often climb on a bus in a strange city and go wherever it takes us—these are the only blind dates we keep. At the end of the bus line we walked down that little street. We looked in the windows, and in the windows we saw the stars, sometimes one, and sometimes two, and sometimes three. Those people know now what peace will mean. Those people know that there must be unity and determination, and those people know

that when those bells of victory ring, we mustn't let the joy and relaxation which comes with it cause us to forget the warnings of the past. Don't let men and nations become careless again.

That is why I am glad I am speaking to you here tonight. We lawyers, the crusaders of the days of old—yes, I mean that—I go back to those old Inns in England. I go back to the days when the lawyers were the crusaders and finally had to decide whether it would be the Bar or whether it would be the Church, but they were the men—they were the men who carried the cross and went forward, and crusaded for Christianity, crusaded for the things that we believe in. Yes, you are the leaders in those cities and in those towns and in those villages. You are the people who must see that this great, great demand—necessity—for peace, is not allowed to die because overnight the bells of victory ring and you don't have to use ration coupons any more. Don't—don't—let this necessity be forgotten again.

We must proclaim our belief, we must proclaim our support for making peace a permanent thing. We must make the demand for this lasting peace so full of life that it will never, never die.

We must work for this, if we honestly, as God-fearing people, believe when we pray that peace and happiness, truth and justice, religion and piety may be established among us for all generations. Oh, yes, if this lasting peace comes, then those who gave so much will know that their sacrifice was glorious indeed. They will know that in that short span they did all that a man can do. They will know that that dream and that of your forefathers has come true.

They died—they died so that you might enjoy freedom, and they gave you that Constitution so that you might make peace, and I want to give you now just a short quotation because it appealed to me as something that I thought should belong not only to the United States—oh, it should belong to men and women and little children, too, all over the world:

"There was a dream—that men could one day speak the thoughts of their own choosing. There was a hope—that men could one day stroll through streets at evening, unafraid. There was a prayer—that each could speak to his own God, his own church. That dream, that hope, that prayer became—America!"

I want to see that all over the world.

So may I say in parting tonight that I only ask something that comes from my heart, something that I ask that the lawyers of this Association think about, a lasting peace, talk about a lasting peace, work for a lasting peace, and, men and women, above everything else—pray for it!

(The Assembly rose and applauded.)

NEED FOR FAITH

Continued from page 570

work our way back from the jungle of experiment and once more pick up the trail that experience has blazed for us.

When you are trying to evaluate a political or a governmental proposal, always remember that the American is still something of a frontiersman, at his best when you do not cramp his style, or too greatly hamper his initiative. If you want to find the specifications for an American, and for his English brother, look at the first nine amendments to our Constitution, now a hundred and fifty-three years old. There you will see the American of today, Mr. President, who, with just as much tenacity as the founding fathers, clings to religious liberty, to freedom of speech, to the right to keep and bear arms, to the right to be protected against unwarranted search and seizure, to the right to resist inquisitorial proceedings in criminal cases, and the right to have his case, whether civil or criminal, submitted to a jury, the right to be protected against cruel and unusual punishments, the right to insist up-

on just compensation for the taking of private property for public use, and just as earnestly as the founding fathers, that he shall not be deprived of life, liberty or property without due process of law.

Ladies and gentlemen, you may talk about words like individualism as much as you please, but the man who has these rights and is willing to fight for them is an individual, and anybody who tries to take them from him will discover that he is a rugged individual. The Germans and the Japs failed to appreciate this fact, and tonight on many fronts our boys, our sons and our grandsons, are demonstrating to them their tragic mistake.

And when I think of those boys, when I hear what Brockington has told us, when I think of their calm courage, of their steadfastness, of their resourcefulness, I am filled with the faith which leads me to believe that America is still very much alive, that our American system is the only one under which such boys can grow to manhood and live richly and abundantly and fruitfully. And I beg all of you, young and old alike, with the echoes of Brockington's address ringing in your ears, to use this as the occasion for rededicating yourselves to profound faith in the American system, to rededicate yourselves to the work of protecting it to the end that you may have strength and courage to do your bit. My dear friends, it *is* a Great Old Republic and it is a Grand Old Flag; and I am going to close by quoting a homely sentiment which quaintly expresses our loyalty to our Union:

'Tis a Union of lakes and a Union of lands,
And a Union of States none can sever;
A Union of hearts and a Union of hands,
And the flag of the Union forever!

[The audience arose and applauded.]

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EXTENSION AGREEMENTS WITH DEBTORS, A Manual of Procedures and Methods, by Carl B. Everberg. 1944. New York: The Ronald Press. $3.50.

AIRPORTS AND THE COURTS, by Charles S. Rhyne. 1944. Washington, D. C: National Institute of Municipal Law Officers. $5.00.

THE ROAD TO SERFDOM, by Friedrich A. Hayek, with foreword by John Chamberlain. 1944. Chicago: The University of Chicago Press. $2.75.

CARTELS, CHALLENGE TO A FREE WORLD, by Wendell Berge. 1944. Washington: Public Affairs Press, American Council on Public Affairs. $3.25.

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